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No. 95-992

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

TURNER BROADCASTING SYSTEM, INC., *et al.*,
Appellants,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Appellees.

Appeal from the United States District Court for the District of Columbia

JOINT APPENDIX
Volume IV

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645. The record indicated that: "For the holders of the more than 200 outstanding television construction permits, cable carriage may determine whether their stations are actually built." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 426 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06884.

646. The following information was in the record:

> "A decline in revenue generating capability can be expected to discourage or delay construction of unbuilt stations for which construction permits have been issued. Apparently, between December 31, 1990, and June 30, 1991, three UHF construction permits have been forfeited. [Citing Public Notice, 'Television Channel Utilization' (March 20, 1991); Public Notice, 'Television Channel Utilization' (August 30, 1991). The number of pending CP's has decreased by seven, while the number of licensed stations has increased by four.] Similarly, between June 30, 1989, and June 30, 1991, 32 UHF construction permits have been forfeited. [Citing Public Notice, 'Television Channel Utilization' (September 7, 1989); Public Notice, 'Television Channel Utilization' (August 30, 1991). The number of pending CP's has decreased by 59, while the number of licensed stations has increased by 41, and the number of applications granted was 14. Meanwhile, the number of vacant channels increased by 41, including nine new channel allotments.] Between June 30, 1989 and June 30, 1991, two VHF construction permits also have been forfeited. [Citing Public Notice, 'Television Channel Utilization' (September 7, 1989); Public Notice, 'Television Channel Utilization' (August 30, 1991)]. These forfeited permits represent stations applicants were willing to build prior to 1989. Most undoubtedly filed their

applications before must-carry rules met their second demise in December, 1987. Notably, it is almost as many stations as did commence operation (41) in the same period."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 63 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08384.

647. The record indicated that: "Lack of assured carriage also has stifled construction of authorized facilities. Since December 11, 1987, when the must carry rules were held unconstitutional, 116 construction permits have been granted for new broadcast television stations. However, only 33 have commenced operation, and one of those already has ceased operating. Applications are pending for 42 channels, and 223 channels remain vacant. The same trend is evident in the number of pending applications for new television stations. Among communities in which applications are still pending, applications for 11 communities were filed in 1987, but for only six in 1988, for seven in 1989, for five in 1990, and for three in 1991. Yet, the number of unbuilt stations, pending applications, and vacant channels provides an enormous opportunity to expand and improve broadcast television, as well as exert increasing price discipline on cable rates." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 20-21 (Oct. 25 1991); CR VOL. I.Q, EXH. 81, CR 11378-79.

648. The record indicated that: "Absence of must carry makes it very diffcult for new stations to attract start-up financing, particularly for minorities who are often the last in the market, with high channel UHF stations and less than optimal transmitter locations." Source: Testimony of Ed Parker, Blackstar Communications, Inc., Orlando, FL, in MM Docket 89-600 at 1 (March 2, 1990); CR VOL. I.R, EXH. 84, CR 11486.

649. The following information was included in the record: "The precarious position in which many existing UHF independent stations find themselves raises the very real possibility that a significant number of this country's independent UHF television stations will not be able to survive cable noncarriage or cable channel relocation. [Citing 'Pop Goes the Stations' *Channels,* January 1988, at 73.] Likewise, it has become much more difficult for prospective independent UHF station owners to borrow the money needed to start and operate a new station. Failure to arrange for adequate cable carriage, usually means that no financing is forthcoming." Source: "Hearings on Competitive Problems" at 333 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05266.

650. The following information was also in the record:

"The recent experience of Robert Broadcasting, a minority owned company, in constructing WHSL-TV, Channel 46, the first new commercial television station in St. Louis in 20 years, illustrates how the financing of new local television stations has become tied to cable carriage since The Cable Act. Roberts Broadcasting applied to the FCC for a construction permit to build Channel 46 in 1981 and then engaged in a six year, expensive comparative hearing. In 1987, Roberts Broadcasting was awarded a construction permit. After receiving the CP, however, Roberts Broadcasting began what became the more difficult process of securing construction financing. In 1981, in securing a financial commitment, the company found that banks were interested in two primary considerations: the capability of station management and the station's proposed programming. By 1987, a significant new consideration had arisen. In addition to management capability and

programming proposals, banks demanded to know the cable penetration in the market and whether the permittee had guarantees that the new station would be carried on local cable systems. In the Roberts Broadcasting case, even though its business plan demonstrated strong abilities in management and programming, cable carriage was so unpredictable that bank after bank refused to extend construction financing. What Roberts Broadcasting and other new entrants have found is that the rules of the game changed from the time when cable systems were required to carry local television stations and 1987, when must carry was no longer required and cable had become the dominant video gateway to the home.

Source: Joint Reply Comments of Blackstar Communications, et al., in MM Docket No. 89-600 at 3-4 (Apr. 2, 1990); CR VOL. I.X, EXH. 120, CR 14404-05.

651. The record also indicated:

"Minority entrepreneurs seeking to construct or acquire UHF, independent television stations face an uphill battle under any circumstances. These individuals usually possess relatively little capital, and depend on creative financing and inordinate amounts of debts to finance their ventures. Such disproportionate debt burdens demand precise projections assured achievement of revenue and operating profit to meet interest and principal payments to lenders and investors. Minority television entrepreneurs attempting to raise capital, therefore, face tremendous obtsacles, which even if overcome, place them in an operating environment with little room for error. Already bearing the financial risks of raising huge amounts of debt with little equity, and meeting burdensome debt service obligations, the minority television entrepreneur must then also manage the operating risks of running what is usually the third or fourth independent station (sixth or seventh overall) in its market. Ironically, this disadvantageous competitive position may be the only factor rendering the station affordable to the otherwise undercapitalized minority entrepreneur.

As a late comer to the industry, under-experienced, under-financed, over-leveraged, bearing financial, competitive and other operating risks, the prospective minority television owner faces a difficult proposition in convincing private or institutional lenders and investors to make the requisite financial commitments for him or her to attain ownership, even with effective must carry regulation. Absent the assurances which must carry offers, *i.e.*, that the minority owned station will be viewed through local cable systems with a competitive signal compared to others in its market, the potential for a station to achieve ambitious financial goals and to meet weighty debt service obligations is dramatically reduced. Consequently, the minority television entrepreneur's likelihood of receiving adequate financing and achieving broadcast ownership is severely diminished.

Based upon my experience as BROADCAP's president, having financed 4 of the 38 minority owned television stations, and having reviewed and considered countless others, I sincerely believe that without some form of must carry protection for the broadcast industry, minority broadcast ownership and the views and opinions they represent, will be considerably impaired."

Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 2-3 (Aug. 8, 1988) (Memorandum from John E. Oxendine); CR VOL. I.Z, EXH. 143, CR 15388-89.

652. The record included the following:

"Scanning the predicament that the limbo of Must Carry Legislation has been in, it has become clear to me that the financial status of local stations without must carry protection is jeopardized.

Sadly, the stations most affected would be new struggling independent UHF stations allocated to serve the local community. They are one of few the broadcast entry level situations available to minorities.

In recent years, I have seen stations that were struggling that needed new ownership and re-capitalization to better program in their city of license. However, prospective investors shied away from a prospective investment, not knowing whether a particular station would have an opportunity to compete on a similar playing field as other stations or cable channels."

Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 1 (Aug. 8, 1988) (Letter from Brian E. Cobb); CR VOL. I.Z, EXH. 143, CR 15385.

653. The record indicated that: "Renck, Levy & Co., Inc. is a Broker/Dealer which over the past two years has been involved in the raising of capital for television stations. We were co-underwriters in an $8,000,000 Limited Partnership offering for Channel 38 Associates which resulted in a 1984 sign on of WNOL-TV in New Orleans, LA. During this time period we have been approached in over 60 instances by business people seeking financing for television stations. More than one-third of these situations involved the sign on of new Independent stations. Historically, in reviewing the economic forecasts of new television stations, we have assumed that a new sign on station would achieve both full Cable TV carriage within 35 miles of its city license during the first full year of operation and full parity with the existing commercial stations during the stations' second year of operation with regard to Cable TV carriage. In my opinion, if television stations should lose their rights to be carried on local Cable-TV systems, it would have a disastrous effect on the economics of financing on a new Independent Station. Making the assumptions that a station would have less than full carriage, and that in some instances Cable TV systems would extract significant carriage fees from local Independent television stations, both a decrease in revenues and an increase in expenses could result. The elimination of the 'must carry' rules would cause substantial difficulty in the raising of capital for new television stations being built." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (Letter from Robert Renck); CR VOL. I.Y, EXH. 128, CR 15021.

654. The record indicated that: "Absent assured cable carriage in cable markets, would-be new stations are caught in a vicious financial vise. On the average, to put a new television station on the air now costs between $3 million and $4 million, according to Thomas J. Buono, President, Broadcast Investment Analysis, Chantilly, Virginia. Attracting and retaining investment capital of this magnitude is difficult or impossible if there is the possibility that the new station, once operational, will be hobbled during its start-up period by the inability to even begin to compete for the attention of the cabled portion of its potential audience." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 36 (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 15018.

655. The record indicated that: "[N]ew station applications to the FCC are down by about 80 percent over numbers of applications. No explanation is apparent than the loss of assured carriage; there is not, for example, any

significant reduction in available channels, and except for the threat noted by the carriage problem, new stations are generally considered an attractive investment." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 36-37 (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 15018-19.

656. The record included the following:

> "Minority business that are undercapitalized have even greater risk of failure because of cable system droppage or channel repositioning. Research evidence has confirmed that only a very small percentage of cable subscribers may also receive over the air broadcast signals, and that over the air reception obtained only with the addition of internal and/or external hardware, is likely to be of inferior quality. Potential audiences for these stations would, as a consequence, have strong disincentives from viewing, which would subsequently decrease advertising demands for commercial time on these stations, and ultimately diminsh the existing minority owned station's opportunity for economic viability. While the threat to existing minority owned stations without must carriage is great, must carry's absence poses an even greater threat to future and aspiring minority television owners. Minorities are, in general, late entrants to the broadcast industry, in a time when rising demand for more viable VHF, network affiliates has made such stations prohibitively expensive and all but unobtainable for traditionally undercapitalized minorities. Independent UHF stations, although also having risen dramatically in cost and value, remain within reach of some serious minority entrepreneurs and investors. Such stations, however, are the most likely to be affected by the lack of effective must carriage regulations. Testimony collected by the NAB has already documented the

> negative impact on one such station, of the only 38 television stations most recently estimated as being minority owned in the nation."

Source: Reply Comments of the National Association of Broadcasters, in MM Docket No. 88-138 at 2 (Aug. 8, 1988) (Memorandum from John E. Oxendine); CR VOL. I.Z, EXH. 143, CR 15388.

657. The record included the following: "Thanks in large part to Commission policies, the number of local television stations owned by minorities has increased from 17 in 1982 to 46 today and 10% of the 215 outstanding TV construction permits are held by minorities. While this is real progress, minorities are only 3.2% of all TV stations. I am convinced that the number will not continue to grow and, indeed, may shrink if local stations are not given the same access to the home as cable delivered programming. Many minority and other holders of construction permits are discovering that lending institutions know that cable carriage and financial viability are closely intertwined. A fundamental concern of lenders now is the station's guarantees of cable carriage. No guarantees often means no money to build. I am convinced that many, indeed most, of the 215 stations authorized by the Cps will not be build as long as cable systems are not required to carry all local full power television stations in their market." Source: Letter from Blackstar Communications, Inc. to Federal Communications Commission, in MM Docket No. 89-600 at 2 (rec'd April 11, 1990); CR VOL. I.X, EXH. 123, CR 14530.

658. The record also indicated that: "The precarious position in which many existing UHF independent stations find themselves raises the very real possibility that a significant number of this country's independent UHF television stations will not be able to survive cable noncarriage or cable channel relocation. [Citing 'Pop Goes the Stations' *Channels,* January 1988, at 73.] Likewise,

it has become much more difficult for prospective independent UHF station owners to borrow the money needed to start and operate a new station. Failure to arrange for adequate cable carriage, usually means that no financing is forthcoming." Sources: "Hearings on Competitive Problems" at 33 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05266.

4. *Evidence That The Absence Of Cable Carriage Had Already Jeopardized The Continued Operation Of Some Broadcast Stations.*

659. Congress was informed by FCC Commissioner Quello that:

> "Twenty-three independent stations are now in Chapter 11. The trend is growing. Is it caused by no must carry? No, not completely and in some cases not at all. But the mere threat of no must carry is a contributing cause. Banks are reluctant to lend money to station's with no assurance of carriage. Will the independent stations' viability be threatened by no must carry or even by the power of a cable company to inflict no must carry at any time? The answer has to be a resounding yes. To any practical businessman, or to any fair-minded body, no must carry or the threat of it can only aggravate an already economically pressed local independent service."

Source: "Hearings on Media Ownership" at 314-15 (Statement of James H. Quello); CR VOL. I.D, EXH. 9, CR 02400-01.

660. The record included the following:

> "I represent the investors and the financial institutions who financed the construction and operation of WCOM-TV in Mansfield, OH, a small market UHF

station that began to air in February of 1988 and subsequently went dark in June of 1989. The station's original date of air was just two weeks after the must-carry rules were rescinded in February of 1988, but after an investment of $3 million had already been made to build the technical facility for the station.

WCOM-TV exerted every effort, throughout the entire period that it was on air, to gain cable carriage from the approximately 82 households within it's grade B contour but was never able to clear carriage on more than 12 systems representing only approximately 48,000 TV households. As a result, the advertising community within that area considered the station 'invisible' and a poor advertising investment.

The station's technical facility included a 1600 foot tower and 2½ million watt transmitter so that WCOM-TV could to provide service to a number of smaller communities in Central Ohio hat do not receive local programming and news attention from the stations in the larger adjacent markets of Columbus and Cleveland. We saw a tremendous opportunity to provide local service to, at minimum, the approximately 300,000 homes in these smaller communities who, additionally, are not provided local service from the approximately 70 cable systems 'serving' this same area.

During the approximately 16 months the station remained on the air, absolutely every cable operator within 50 miles of our city of license was contacted (begged) to carry the station. We had worked hard to assure that virtually none of the programming carried by WCOM-TV was duplicated by stations in either of Cleveland or Columbus so WCOM-TV would be considered totally unique.

> Unable to clear but a fraction of the cable systems in the area, the station finally 'bled' to death. The station's primary service area is approximately 70% cable penetrated and, as noted in the Second Further Notice, cable subscribers do not have antennas with which to watch over-the-air TV. WCOM-TV was, therefore, effectively invisible, and unable, as a result, to generate enough advertising support to keep the station on the air."

Source: Comments of George E. Coles, President, WCOM-TV, Columbus, Ohio, in MM Docket No. 90-4 at 1-3 (Sept. 24, 1991); CR VOL. I.P, EXH. 61, CR 10764-65.

661. The record indicated that: "This problem has become so widespread and so severe that it has effectively halted the growth of free over-the-air broadcasting by drying up sources of financing for new stations. More-financial difficulties of the 23 Independent stations that have filed for bankruptcy." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08547.

662. The record also indicated that. "For example, WCVX-TV, Martha's Vineyard, MA, was unable to secure carriage to a substantial portion of its viewing area. Ultimately, its largest creditor took over the station. The single largest factor forcing the bank to foreclose was the station's inability to access the vast majority of cable subscribers." Source: Appendices to Testimony of James B. Hedlund, President, Association of Independent Television Stations, Inc. Before the Subcommittee on Telecommunications & Finance, Committee on Energy & Commerce, U.S. House of Representatives at 16 n.19 (Statement of James H. Quello); CR VOL. I.M, EXH. 24, CR 09169.

663. The following information was in the record: "Moreover, local UHF independent stations are the most vulnerable financially. Although INTV's studies indicate that a majority of UHF independents currently on the air ultimately achieve profitability, a very substantial minority are unprofitable. Indeed, according to data compiled by NAB and summarized in a document to be appended to NAB's Comments in this proceeding, 58 of the 124 independents (46.8%) responding to NAB's 1985 financial study reported pre-tax losses for 1984, and 55 percent of the responding UHF independents reported pre-tax losses. Thus, it is clear that the absence of any local signal carriage regulation would impact most severely the very stations which are least capable of incurring additional operating handicaps. As the cable operator in Oxnard, California declared: 'Without cable's cooperation, they won't survive.'" Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 80-81 (Jan. 29, 1986) (citing *Cable TV Franchising*, Dec. 23, 1985 at 3 (reefrring to KTIE)); CR VOL. I.BB, EXH. 162, CR 15908-09.

664. The record indicated that: "I am Leon A. Crosby, the former licensee of WPTJ-TV (formerly WFAT, WJNL, WARD) channel 19, Johnstown, Pennsylvania. I owned and operated the station from February 1983 through the Fall of 1989. WFAT was literally forced off the air by harsh treatment it received from the cable systems located in the Johnstown-Altoona area." Source: Comments of Leon A. Crosby, Former licensee of WPTJ-TV, Johnstown, PA in NM Docket No. 90-4 at 1 (Sept. 25, 1991); CR VOL. I.P, EXH. 63, CR 10780.

665. The record indicated that: "Once dropped or assigned to 'channel Siberia,' a station loses access to its potential audience and never could even hope to re-enter the video marketplace and compete. Indeed, in a time of uncertainty about carriage status, dark stations are likely

to remain dark. When lack of carriage or channel position has dealt a mortal blow to a station, no rational entrepreneur is at all likely to step in and attempt a 'turnaround' of the failing station." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 62 n.115 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08383.

666. The record included the following information: "New sign-on stations have met with a virtual stonewall of cable resistance. The absence of must-carry regulations has resulted in a dramatic increase in the number of unbuilt television broadcast construction permits being surrendered to the FCC. Appended hereto at Attachment No. 4, is a copy of a letter notifying the FCC of the cessation of operation of in Independent station *because of* the inability to secure cable carriage." Source: "Hearings on Must Carry" at 72 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04082.

667. The following information was in the record: "Since the invalidation of the must-carry rules, a far greater number of stations are failing and going silent, a fact which the Commission has noted. Since the invalidation of the must-carry rules, far fewer stations have been built, because new stations, particularly, have no assurance that they will be carried on any cable system or given access to the viewers which new stations need to build audience to survive. Since the invalidation of the must-carry rules, many more broadcast construction permits have been forfeited. In point of fact, a review of the Commission's records will show that the construction of new television stations has ground to a practical halt. The lack of expansion of television service, in fact, its contraction since the invalidation of must-carry rule, is the direct result of the lack of cable carriage." Source: Reply Comments of the Trinity Broadcasting Network in MM Docket No. 90-4 at 5-6 (Oct. 25, 1991); CR VOL. I.Q, EXH. 77, CR 11276-77.

668. The record indicated that: "Given the marginal financial position of many UHF independents, deletion from cable or relocation to an undesirable cable channel location is likely to cause some of these stations to go 'dark.' Likewise, financing for new UHFs is likely to be severely limited in the absence of a cable carriage agreement." Source: "Hearings on Competitive Problems" at 338 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05271.

669. The record also indicated that: "Indeed, thirteen stations which commenced operation after January 1, 1988, have since left the air. The Commission staff has predicted continued decline in the industry, especially outside the top 10 markets and in the independent television sector even in large markets." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 18 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11376.

670. The record included the following: "The precarious position in which many existing UHF independent stations find themselves raises the very real possibility that a significant number of this country's independent UHF television stations will not be able to survive cable noncarriage or cable channel relocation. [Citing 'Pop Goes the Stations' *Channels*, January 1988, at 73.] Likewise, it has become much more difficult for prospective independent UHF station owners to borrow the money needed to start and operate a new station. Failure to arrange for adequate cable carriage, usually means that no financing is forthcoming." Source: "Hearings on Competitive Problems" at 333 (Statement of Edward O. Fritts); CR VOL. I.H, EXH. 14, CR 05266.

671. The record indicated that: "Cable operators now view new commercial Independent broadcasting stations as little more than unwanted competition for viewers' eyeballs and advertisers' dollars. As a consequence all across the country new stations have met with a vir-

tual stonewall of opposition from cable operators who have refused to add these new stations to their service offerings. For example, my company was forced to seek the intervention of a member of Congress in order to secure carriage of our Cleveland station on one area cable system. Cable industry resistance has contributed significantly to the bankruptcy of 23 new Independent television stations." Source: "Hearings on Competitive Issues" at 547 (Statement of Milton Maltz); CR VOL. I.C, EXH. 8, CR 01886.

672. The record also indicated that: "Twenty-three commercial Independents are in various stages of bankruptcy proceeding. While cable carriage practices were not the sole cause of these bankruptcies, they certainly were a contributing factor. Dozens of other stations have been forced to cease operations or convert into 'home shopping' outlets." Source: "Hearings on Must Carry" at 72 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04082.

673. The record included the following information:

> "WSJT first came on the air in July 1991, as WRBV (licensed to Renaissance Broadcasting Corp.). At that time, most cable systems within the station's viewing area refused requests to carry under the 'must carry rules.' The station's financia! resources were depleted by the costs of construction delays and normal start-up expenses; it had no resources to initiate and follow through on litigation to enforce its cable carriage rights. The station entered receivership (and eventually bankruptcy) on December 4, 1981. The bankruptcy trustee, seeking to preserve the station's operation for the benefit of New Jersey and the City of Vineland, expended large sums of money to litigate with the cable systems. Such large systems as NYT Cable (100,000+ subscribers), Atlantic Coast TV Cable (15,000+ subscribers) and Crosswicks Industries (12,000 subscribers) were required to add then-WRBV's signal, and remaining cable systems not specifically mentioned in that proceeding quickly followed with carriage. The increased cable penetration gained the station the necessary audienec to permit it to run at an operating profit during the bankruptcy period. . . . If WSJT loses its current status of full carriage within its specified zone, as defined by the 'must carry' rules, I estimate an immediate loss of 50 per cent of WSJT's advertising revenue. Such a loss would be a fatal blow to New Jersey's largest broadcast television station, and the only one serving the entire southern half of the state."

Source: Comments of the Motion Picture Association of America, Inc. in MM Docket No. 85-349 at ¶¶ 6,8 (Jan. 9, 1986) (Affidavit of Brian Echert); CR VOL. I.AA, EXH. 151, CR 15603-05.

674. The record also included information identifying thirteen broadcast stations that went off the air between January 1, 1988 and April 9, 1991. Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 1 (Oct. 25, 1991) (Exhibit C); CR VOL. I.S, EXH. 81, CR 11436.

675. The record indicated that:

> "Another illustration of the effects of lack of cable carriage is station KFTH, Conroe, Texas. The station has sought protection under the bankruptcy laws and is on the verge of converting its Chapter 11 reorganization into a Chapter 7 liquidation proceeding. The conversion would result from the station's inability to service its debt. Income has been insufficient largely because the station is not being carried on cable in the Houston market, where the station is located. Twenty-seven systems with 95% of the cable subscribers in the market refuse to carry the station. Consequently, the station has no access to

nearly 50% of the households in the market. The station finds advertisers reluctant to buy time on the station because it is not carried on cable. The service lost if the station fails will be significant. KFTH is a Spanish-language station serving a large niche in the market, which is 23% Hispanic. The station broadcasts 18 hours of Spanish-language programming seven days per week including six hours per week of locally-produced programming. This service will vanish from the market if the station is forced into liquidation."

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 17-18 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11375-76.

676. The record indicated that: "Last year twenty-three commercial Independents were in various stages of bankruptcy proceedings. A recent survey conducted by the *INTV Journal* found that 12 Independent stations went off the air in 1989. While cable carriers practices were not the sole cause of these bankruptcies, they certainly were a major factor." Source: "Hearings on Cable Television Regulation" at 876 (Statement of James B. Hedlund); VOL. I.J, EXH. 18, CR 07880.

677. The record included the following: "Independent UHF television stations constitute the most vulnerable class of over-the-air broadcast stations with respect to cable non-carriage or relocation. This is not only due to the reasons noted above (*i.e.*, significant reduction in viewership and subsequently advertising revenues expected to result from noncarriage or unfavorable relocation), but also because many of these stations are only marginally profitable. During 1986, the average UHF independent station lost $1.4 million dollars; 25 percent of these stations lost more than $2.5 million dollars and 50 percent lost more than $1.2 million. According to one report, 20 independent television stations are currently under Chapter 11 protection." Source: "Hearings on Competitive Problems" at 332-333 (Statement of Edward O. Fritts) (citing "Pop Goes the Stations", *Channels*, Jan. 1988, at 73); CR VOL. I.H, EXH. 14, CR 05265-66.

678. The record indicated that: "WAYK, Channel 56, Melbourne, Florida, and WAYQ, channel 26, Daytona Beach, began operations in March, 1986, and September, 1988, respectively. They are commonly-owned. In early 1990, the owners reported: 'We are close to bankruptcy and going dark . . . [W]e have not gained access to Cablevision of central Florida, 170,000 subscribers in Orlando, Orange, Seminole, and Osceola Counties. . . . We are on part time now.'" Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 50 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08371.

679. The following information was in the record:

"July 19, 1985 was the day WCVX commenced operation as a full power station. This was also the same day the U.S. Court of Appeals released its decision vacating the FCC's 'must carry' rules. From the outset, the station was faced with a severe handicap. Cape Cod and the Islands are heavily cabled. The demise of 'must carry' resulted in the loss of carriage on 14 cable systems, representing approximately 115,000 subscribers. Because the largest cable operator in the area was doing a news program and aggressively selling advertising at a very low rate, they deemed it inappropriate to put WCVX on their system.

To compound the economic woes of the station, most of areas served by the station are in the Providence of Boston A.D.I., thereby severely hampering efforts to sell national and regional advertising and impairing the stations ability to purchase first-rate programming.

Through William Cotter, limited partner, private monies had been pledged and bank loans secured. On February 9, 1986, Mr. Cotter died, leaving me in debt to his estate, with borrowing abilities from local banks cut in half.

From July 1985 to December 1986, WCVX has incurred operating losses before depreciation in excess of $2,625,500.00.

I have tried ot sell the station both privately and through several broadcast station brokers. Due to the glut of UHF television stations on the market, since the demise of the 'must carry' rule, all of these attempts failed to bring forth any serious buyers.

The only offer to purchase which I have received has come from a group of local broadcasters, who came forward with a plan which they felt would enable the station to continue broadcasting. After many discussions, the plan was finalized. This group is METRO Television, Inc.

I have been apprised by my lender that unless the proposed sale to Metro Television, Inc. is approved and consummated expeditiously, steps will be taken to foreclose on the loans, which would result in bankruptcy, and the termination of broadcasting by WCVX."

Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at 1-2 (April 2, 1990) (Affidavit of Donald P. Moore); CR VOL. I.X, EXH. 119, CR 14288-89.

680. The following information was in the record: "INTV has compiled a complete review of the status of every allotted television channel, based on Section 73.606 of the Commission's rules, the Commission's Television Channel Utilization report, and data made available by Warren Publications Data Services. A list of the stations which have commenced operation, but then left the air is

attached hereto as Exhibit C. WPTJ went dark in mid-1990 after being on the air continuously for 30 years! The Johnstown-Altoona market is 80% cable households, and the station reports it simply could not survive without cable carriage." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 16 n.18 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11374.

681. The record indicated that: "In the earlier paper, we suggested that non-carriage could have a perilous impact on certain broadcasters who were at that time facing severe financial difficulties. This too has only increased in its likelihood. Many stations, especially independent stations, are losing considerable amounts of money. In fact, in 1987, 20 independent station were under Chapter 11 bankruptcy protection." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 14982.

682. *See also* discussion of KTIE in Section VI.B *supra* ("It is virtually impossible for a small, local TV station to become a viable, profitable operation with such a major portion of its market denied to it"); *id.* ("The effects of cable non-carriage [on KTIE] have been devastating. . . . We have been forced to invest additional funds at the rate of $200,000 per month to keep KTIE on the air. During the past ten months ended October 31, 111986, KTIE suffered losses of $1,900,000.").

683. *See also* discussion of KWBI in Section VI.B *supra* (indicating that " 'there is no other factor more important to the viability of [KWBI] than cable carriage' and that it is in a 'survival mode' and will probably go dark if local carriage is not obtained in the next two years.' ").

5. *Evidence That Regardless Of Whether A Station Goes "Dark," Loss Of Cable Carriage Substantially Diminishes The Station's Broadcasting Service To The Community.*

684. The following information was in the record:

"When the ability of local television stations to be and remain viable is threatened, the quality of local merit programming—news, public affairs and informational programming—suffers. For example, at WKPT-TV, Kingsport, Tennessee, an ABC affiliate, the weekly cost of producing and airing 6½ hours of local news and public affairs is about the same as the cost of syndicated programming for all other non-network hours on the station. When revenues decrease, items necessary to improve the quality of local news—mobile satellite dishes, electronic news gathering equipment, mobile radios, travel budget for the news staff—must be cutback or eliminated. This is because the cost of syndicated non-news programming will remain the same, and costs can't be cut there short of turning the station off for periods of time during the otherwise normal broadcast day. Sure, local stations can maintain the quantity of local news and public affairs—such stations can resort to the 'talking head in front of the blue curtain' approach to local news. But, how does this serve the public interest—presenting a newscast no one will watch.

Therefore, the very essence of localism—the highest quality local news and public affairs shows designed for the local viewing areas—will suffer if the ability of small-market television stations, and especially small-market UHF television stations, to generate revenues is impaired."

Source: Comments of Buffalo Broadcasting Company, Inc. in MM Docket No. 85-349 at 4-5 (January 29, 1986); CR VOL. I.GG, EXH. 211, CR 18289.

685. The record indicated that: "Particularly in a context where nonbroadcast video services are proliferating and audiences are increasingly difficult to attract, a broadcaster subjected to such cable practices will not in the long run be able to produce or purchase the programming needed to function as an effective competitor." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 19-20 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74, CR 11248-49.

686. The record also indicated that: "For the most part, the loss of revenues occasioned by lack of carriage has its greatest impact on local news and public affairs programming." Source: Reply Comments of Telecommunications Research and Action Center in MM Docket No. 90-4 at 3 (Oct. 25, 1991); CR VOL. I.Q, EXH. 76, CR 11265.

687. The record indicated that: "It is estimated that 34.9% of a station's expenses are for program and production. NAB/BCFM 1991 Television Financial Report at VII." Source: A Report of the Register of Copyrights, "The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis" at 53 n.84 (March 1992); CR VOL. I.M, EXH. 26, CR 09534.

688. The record included the following information: "It is axiomatic that commercial television stations derive their revenues from the sale of advertising, and that those sales are a function of audience. It is also well established that programming is generally a major—and often the major—expense item for local stations; in 1984, for example, on the average, stations spent 47.7 percent of their revenues upon program production and acquisition. [Citing NAB, 1985 Television Financial Report, at 6 (1985)] Local programming is costly, representing ap-

proximately 29 percent of total expenses and 20.5 percent of net revenues, on the average in 1984. [Citing id. at 40, 70]." Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 34 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16192.

689. The record indicated that: "An indication of the magnitude of these programming costs can be seen from the 1984 NAB Financial Survey of all commercial stations. From that survey, it was found that in 1983 the average (including affiliated and independent stations) amount spent on programming, production and news was $3,444,600, or 46.8% of the total expenses for the average station. For independent stations (both UHF and VHF stations), the average amount spent for these programming-related categories was $5,876,300, or 55.2% of total expenses." Source: *CRT Reform and Compulsory Licenses: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary*, 99th Cong., 1st Sess. at 312 (June 19, 1985); CR VOL. I.B, EXH. 6, CR 00900.

690. The record indicated that: "My revenue is solely derived from my audience delivery. When I cannot reach viewers because of cables placement of my signal, I lose revenue. This will ultimately affect my ability to air quality programming that serves the public's interest." Source: Statement of Harvey E. Cohen, President and General Manager of WDZL, Channel 39, Miami, Florida, Before the FCC, in MM Docket No. 89-600 at 3 (March 2, 1990); CR VOL. I.R, EXH. 85, CR 11505.

691. The record also indicated: "WMFP signed on the air in October 1987, while the FCC's new must-carry rules were still in effect. Prior to thier on-air date, the station sent letters to all 53 cable systems operating within 50 miles of Lawrence. However, as of mid-April 1988, WMFP had achieved carriage on only three cable systems in its market. The President of the station, Avi Nelson,

observed that '. . . as a new local station, the cable situation has certainly been adverse for us. It has compromised our ability to develop the new station, and it has caused us to scale back our plans for programming, especially in the area of local programs.' " Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 19 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08573.

692. The record included the following:

> "When it signed on October 1985, KOOG became only the second Independent station in the entire Salt Lake City market. Despite a very respectable program schedule, the station was unable to achieve *any* cable carriage whatsoever. Virtually all of the cable systems within 50 miles of Ogden are owned by TCI.
>
> During this period, TCI President John Malone was q/uoted in the press as having advised financial analysts of his plans to create regional cable channels that would resemble Independent television stations. Dr. Malone was further quoted as stating that his new cable channels would be most effective in those regions where multiple over-the-air Independents were *not* well established. He specifically cited the Rocky Mountain States as one such region. Thus, TCI's absolute refusal to carry KOOG had the appearance of anti-competitive behavior.
>
> KOOG's owners and INTV spent a year begging and cajoling TCI to give the station a chance. TCI finally put KOOG on its Ogden system but refused to add it to any of its big Salt Lake City area systems. Because the station was locked out of almost all the cable homes in its market, its ratings were poor and it was unable to meet the payment on its programming contracts. As a result, KOOG affiliated with Home Shopping Network for part of each day

just to keep the lights on. TCI, which owns a competing home shopping service, then used their format change as a new excuse to deny KOOG carriage."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 4 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08557.

693. The record also included:

"WYED-TV currently features 'Home Shopping' programming, although its goal is to feature community issue-oriented programming. For instance, WYED-TV is currently looking for a sponsor for one segment of a new program entitled 'Hometown, North Carolina." This particular segment features the city of Goldsboro. WYED-TV is also in the process of doing a segment featuring the town of Clayton. Future segments featuring each of the towns within WYED-TV's service area are in the planning stages. 'Home town North Carolina' is an interview program, featuring local political officials discussing the past, present and future of the particular community. WYED-TV also has plans to feature a program entitled 'Speak Out.' During this program, local political officials will discuss current community issues.

WYED-TV has been denied carriage by all but one cable system in its service area. In an attempt to gain access to these cable systems, WYED-TV has offered them local programming, such as 'Hometown North Carolina,' at no charge, for carriage on the cable system's local access channels. Unfortunately, not one of the nineteen cable systems has expressed any interest. In fact, one cable system manager stated to a principal of Group H, that his system would carry WYED-TV *only* if the government ordered it to do so. Some of these cable systems, however, are carrying the signals of broadcast stations located hundreds of miles away from Goldsboro, in another state. *See* Table 3, *Appendix*. [Cablevision of Fayetteville, Fayetteville, NC, Essex Cable TV, Franklin, NC] Clearly, a station located in Spartanburg, *South* Carolina, well over 200 miles away from Goldsboro, *North* Carolina, will have very little interest in addressing the needs of Goldsboro or any of the communities in Wayne or Wilson counties.

WYED-TV's inability to obtain carriage on all but one cable system has made it practically impossible to attract advertisers to sponsor its local programs."

Source: Comments of Group H Broadcasting Corp. in MM Docket No. 88-138 at 6-7 (July 8, 1988); CR VOL. I.Z, EXH. 133, CR 15231-32.

694. The record indicated that:

"The deletion of WHMB from local cable systems has resulted in station customers removing their advertising or paid programming, seeking to renegotiate contracts, or refusing to purchase additional time until the station is carried on cable. It has also forced the cancellation of locally produced programming specifically directed to communities in the station's service area. As a result of the dropped carriage it is no longer possible to obtain the advertising revenue from these communities which is necessary to support such programs.

WHMB devotes approximately twenty hours per week to locally produced programming, including a weekly thirty-minute public affairs program, a daily weekly thirty-minute health program. WHMB also broadcasts locally produced high school basketball, football and soccer games, as well as local religious programming. The station provides informational programming during local emergencies, operates a live, twenty-four hour prayer line which receives, in

average, more than 1,500 calls per month, including twenty to thirty potential suicides. In addition to its local programming, WHMB also broadcasts family entertainment and religious programming.

The $120,000 paid annually to Comcast for carriage on its Indianapolis system deprives WHMB of those funds and of its ability to provide more local programming directed to Indianapolis and surrounding communities."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 7-8 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10835-36.

695. The record included the following information about KWHE in Hawaii:

"KHWE, like the other LeSEA stations, offers a mix of family entertainment, religious, and locally produced programming. KWHH is a satellite of KHWE, rebroadcasting KWHE programming in its entirety, but on a tape delayed basis. Approximately 40% of the KWHE programming originates locally, with about 25% religious programming, and the remaining 15% public affairs, local soprts, and entertainment. KWHE currently has an opportunity to enter an agreement with two local universities to provide evening sports programming, but to take advantage of the opportunity must have access to the 83% of television households in the Honolulu market which subscribe to cable. Without access to these viewers, KHWE cannot afford to provide this local programming. The Honolulu system continues to refuse to carry KWHE on anything other than a part-time basis terminating at noon. The local sports programming which KWHE broadcasts, and would like to broadcast, competes directly with the Honolulu systems' local sports carriage."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 17 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10845.

696. The record indicated: "The loss of carriage on the Centre Video system alone would devastate WPTT-TV since the station would lose over half of its audience in the Metro area. WPTT-TV's ratings are a function of the number of households its reaches. If the station cannot reach a sizable number of households in its Metro area, its ratings will plummet. Any decline in ratings directly affects advertising revenues from national, regional and local advertisers. Losses in revenues affect the type and amounts of programming which WPTT-TV can afford to provide or produce. Deletion of WPTT-TV's signal by Centre Video and/or other Metro area cable systems, with a resulting loss of over half of the station's audience, will force WPTT-TV off the air due to economic hardship within six to nine months of such deletion." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 2 (July 8, 1988) (Affidavit of Julian S. Smith); CR VOL. I.Y, EXH. 128, CR 14725.

697. The record also indicated: "As noted in the earlier paper, non-carriage of these financially strained stations might put them over the edge. If carriage is not guaranteed, they will lose a significant portion of their audiences and subsequent revenues. If these stations do not go off-air, they will certainly have to restrict the amounts spent on programming. Both outcomes will seriously affect the non-cabled households who do not presently have a variety of viewing options." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 4 (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 15014.

698. The following information is in the record: "Moreover, not only do WYED-TV's ratings affect the

advertising revenues it can attract, they also affect the syndicated programming it can obtain. Specifically, whether a station obtains syndicated programming depends upon its ratings. Obviously, a station, such as WYED-TV, which realistically has access to no more than 47% of the viewing audience, will never be able to score an impressive rating. Therefore, WYED-TV has little bargaining power with the syndicators. WYED-TV submits that low ratings also adversely affect local programming. 'Hometown North Carolina' is a perfect example of the problems WYED-TV faces regarding local programming. WYED-TV has finished taping a segment featuring the city of Goldsboro, however, it has been unable to obtain a sponsor. WYED-TV, therefore, is caught in a 'Catch-22-situation. WYED-TV cannot achieve good ratings because its *maximum* share of the viewing and audience is 47%. Consequently, it can neither obtain advertising nor programming. This inability to provide diverse programming results in even lower ratings, which in turn make it even more difficult to obtain programming and advertising. The data submitted paints a grim picture for new facilities, such as WYED-TV." Source: Comments of Group H Broadcasting Corp. in MM Docket No. 88-138 at 10 (July 8, 1988); CR VOL. I.Z, EXH. 133, CR 15235.

699. The record also included the following information about WCVX:

> "The scenario described above may have a devastating impact on our ability to sustain meaningful, locally produced, quality programming. At present, 18 percent of our broadcast week is comprised of self-produced non-entertainment programming. This includes a nightly news program with distinct news, weather, and sports segments, aa weekly senior citizen program, and a morning and eventing 'magazine' featuring a variety of local issues and people. We had expected to expand this type of programming rapidly. However, the revenue loss resulting from non-carriage on cable systems may delay or eliminate this objective. It may also force a review of even that programming already in place . . . all of which is by nature cost and labor intensive."

Source: *CRT Reform and Compulsory Licenses: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary*, 99th Cong., 1st Sess. at 360-61 (June 19, 1985); CR VOL. I.B, EXH. 6, CR 01038-39.

700. The record included the following: "Second, repositioning a broadcaster to an unfavorable channel position on the cable system can have a significant impact on the quality of the broadcaster's programming, which in turn, effects its ability to compete. Since a television station's audience size dictates the amount it receives for its sale of advertising, repositioning will reduce the broadcaster's revenues. Reduced revenues directly effects the type and quality of the programming a station can afford." Source: Reply Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 1 (April 2, 1990) (Appendix I); CR VOL. I.W, EXH. 118, CR 14079.

701. The record also included the following:

> Sen. Gore: "I am informed that Channel 50 in Suffolk County, Long Island, provides an outstanding local news program competing with the New York City news that comes from alot of the VHF broadcasters, but that as the cable penetration grew on Long Island they found that people were not watching them any more, or a certain number of them.
>
> So they went, hat in hand, to get on the cable system, and the cable system, as it turned out, had its own news service for Long Island run by Charles Dolan, Channel 12, and the cable company, I am told—and I am going to ask you to comment on

this, Mr. Padden—told the Channel 50 that they would not be able to get on the cable system unless they eliminated their local news program, because it would then compete with the cable company's local news program. They did not want competition, and so they kept the station off until they would agree not to compete.

Now, Mr. Padden, have I stated the facts of that situation wrong? Do you have any knowledge of this?

Mr. Padden: I have heard the same story, and I have also heard that as a part of the continuing negotiation the station has recently reduced its news coverage in an effort to appear as less of a threat to the cable system and get on.

Exactly the same thing happened in Kingston, New York. I have got a news story quoting the cable operator there as saying they put on this little UHF station that had a local news, if they would stop doing their local news."

Source: "Hearing on Must Carry" at 112-13; CR VOL. I.F, EXH. 12, CR 04122-23.

702. The record included the following information:

"Because Kenosha is located between Milwaukee and Chicago, neither the Milwaukee nor Chicago stations regularly provide any local coverage of news or events pertaining specifically to Kenosha and the surrounding communities. Thus, when WHKE commenced operations LeSEA sought to provide a community-oriented local program service, combined family entertainment, religious, local sports, news and public affairs programming. WHKE does not seek to compete with the Milwaukee or Chicago stations, most of which are carried on the Kenosha and other area cable systems. Approximately a year

and a half after signing on-the-air, WHKE commenced broadcasts of a local, half-hour newscast. This provided the first television news directed specifically to Kenosha and surrounding communities, and provided an alternate local news source to the one daily newspaper, and the two commercial radio stations licensed to Kenosha which are co-owned. Unfortunately, without cable carriage and access to more than fifty percent of the television households in its service area, WHKE was unable to continue to support the cost of the local newscast, and was forced to discontinue the broadcast in September of this year.

WHKE also previously broadcast a half-hour daily talk show for approximately thirteen weeks which the local newspaper produced. Absent cable carriage, however, there was insufficient advertiser support to continue the cost of the program, and it too is no longer broadcast. Because WHKE lacks access to the homes of cable subscribers advertisers are unwilling to purchase time on the station, which has forced WHKE to slash all local programming because of the high production costs."

Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 10-11 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10838-39.

703. The record indicated that:

"WTLJ TV has been a victim of the actions of local cable operators since 'must carry' rules were repealed in 1987. Since that time, WTLJ TV has been dropped from cable services throughout the cable system in Muskegon, Michigan, WTLJ's city of license. This action has had the following effects on WTLJ:

* WTLJ no longer has access to approximately 60% of the homes within it's city of license.

* Programming addressing needs and interests of local viewers is no longer reaching homes that have cable. Only access to all local viewing households can effectively motivate a local station to pursue higher levels of public service and quality local programming.

* The tremendous loss of audience demanded 1) deep budget cuts, 2) a change in program format, and 3) the sale of the station.

Source: Comments of Richard L. Woodby, General Manager, WTLJ TV, Muskegon, MI, in MM Docket No. 90-4 at 1-2 (Sept. 13, 1991); CR VOL. I.P, EXH. 57, CR 10708-09.

704. The record indicated that: "It is important to realize, however, that a cable system's refusal to carry a particular station affects not only what the system's subscribers view, but it also indirectly affects what will be viewed by non-subscribers. Simply put, television station's audience size directly translates into revenue—large audiences attract larger revenues, through the sale of advertising time. If a station is not carried on cable, and thereby loses a substantial portion of its audience, it will lose revenue. With less revenue, the station can not serve its community as well. The station will have less money to invest in equipment and programming. The attractiveness of its programming will lessen, as will its audience. Revenues will continue to decline, and the cycle will repeat." Source: "Hearings on Competitive Issues" at 526-27 (Statement of Gary Chapman); CR VOL. I.C, EXH. 8, CR 01865-66.

705. The record also indicated: "The Commission, itself, has recognized what the effect of such a dilemma is on a broadcast station, as the audience a station can deliver decreases, advertisers will demand lower prices per unit of air time, and station revenues and profits

will decline. Decreased revenues and profits will cause the local station to reduce its program efforts and thereby to reduce its service to the public.' *Report and Order* 1 F.C.C. Rcd at 865." Source: Comments of Group H Broadcasting Corp. in MM Docket No. 88-138 at 9-10 (July 8, 1988); CR VOL. I.Z, EXH. 133, CR 15234-35.

706. The record included the following: "February 1, 1991, Video Mall Communications Inc., a new venture led by former management, with prior Federal communications Commission approval, began ownership and operation of each station in an effort to prevent bankruptcy of the television stations. In the absence of any other immediately viable programming option in the short term, Video Mall Communications Inc. programs each station with HSN, local public affairs, and local community service programming. The success of WTJC-T, WTLJ-TV, and all other over-the-air telecasters, is contingent upon gaining access to every viewing household in the respective local coverage areas. The issue of needed cable carriage is far greater than simply maintaining existing formats on WTJC-TV or WTLJ-TV. The paramount concern is allowing and/or fostering new diverse programming formats which are not currently viable options for stations which are denied cable carriage and therefore only marginally received." Source: Comments by Marvin Sparks, President, Video Mall Communications Inc. (Licensee of WTJC-TV and WTLJ-TV, Springfield, Ohio) in MM Docket No. 90-4 at 3-4 (Aug. 30, 1991); CR VOL. I.P, EXH. 54, CR 10690-91.

707. The record indicated: "HSN helped fund the acquisition of the three television stations licensed to Blackstar Communications, Inc., a minority broadcaster. Without cable carriage commitments, Blackstar was unable to secure bank construction financing." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 427-28 (Statement of Roy M. Speer); CR VOL. I.I, EXH. 17, CR 06885-86.

708. The record indicated: "In addition to management and programming proposals, banks demanded to know the cable penetration in the market and whether the permittee had guarantees that the new station would be carried on local cable systems. In the Roberts Broadcasting case, even though its business plan demonstrated strong abilities in management and programming, cable carriage was so unpredictable that bank after bank refused to extend construction financing. . . . Roberts Broadcasting ultimately secured financing from Home Shopping Network, Inc. and signed on last September." Source: Joint Reply Comments of Blackstar Communications, et al., in MM Docket No. 89-600 at 3-4 (Apr. 2, 1990); CR VOL. I.X, EXH. 120, CR 14404-05.

709. The record also included the following information about KWHD: "Distributors of syndicated barter programming have also stated that because KWHD is not on cable they are unwilling to make programming available to it. Daily newspapers do not include KWHD in their TV listings because of the lack of cable carriage. This is also true for *TV Guide* magazine." Source: Comments of LeSEA Broadcasting Corporation, in MM Docket No. 90-4 at 4 (Sept. 25, 1991); CR VOL. I.P, EXH. 65, CR 10832.

710. The record included the following:

> "While the harm suffered by broadcasters caused by the arbitrary carriage practices of their local cable in the absence of carriage regulation should itself prompt the Commission to act expeditiously, of perhaps even greater concern to the Commission should be the resulting harm being caused to the million of viewers who are being deprived of the services of the stations licensed to serve them. As a result of the demise of WPTJ, there is no longer a station to focus on the needs and interests of Westmoreland County, Pennsylvania, nor is there local television

> station on which local businesses can afford to advertise. The demise of WCOM-TV similarly deprived approximately 300,000 homes in small communities in Central Ohio of a television station focusing on their needs and interests. Cable systems' unwillingness to carry KTFH-TV, even if paid to do so, is resulting in much of Houston's Spanish speaking population being deprived of Spanish news, public affairs and entertainment programming.
>
> WHMB, which airs about twenty hours a week of local programming, is unable to afford providing additional local programming to Indianapolis residents because it must pay a local cable operator $120,000 to get carriage. The residents of Kenosha, Wisconsin, cannot get WHKE, the only station licensed to their community, which carries local sports and other local events and public affairs programming, on their own cable system. Moreover, all Kenosha residents have suffered from WHKE's having discontinued its local news and daily talk shows because of its inability to support production costs in absence of local carriage. Viewers in Honolulu are unable to enjoy evening sports provided by two local universities because KWHE is unable to provide this programming in the absence of local carriage during the evening hours."

Source: Reply Comments of the National Association of Broadcasters in MM Docket No. 90-4 at 19-21 (October 25, 1991); CR VOL. I.Q, EXH. 80, CR 11348-50.

711. The record reflects Congress' concern about these consequences: "The record also provides concrete and demonstrable evidence of the harm suffered by local broadcasters when they are not carried by, or are repositioned on, their local cable systems. Such harm has included reduced viewership, lost advertising revenues,

and resulting forced reductions in local news, public affairs, and other public interest programs, the inability of new stations to obtain financing to commence operations, and bankruptcy for existing stations." Source: "1992 House Report" at 51-52; CR VOL. I.A, EXH. 4, CR 00430-31.

VIII. THE CABLE INDUSTRY'S STATEMENTS THAT MUST CARRY REQUIREMENTS WERE IN THE PUBLIC INTEREST AND WERE SUPPORTED BY CABLE.

712. Congress was told the following in testimony by the cable industry's leading association: "Let me begin by stating that NCTA supports Congressional enactment of a constitutionally sound must carry law. We believe cable system carriage of local broadcast stations benefits those stations, benefits the cable operators, and—most important—benefits the public." Source: "Oversight Hearings" at 8 (Statement of James P. Mooney); CR VOL. I.F, EXH. 12, CR 04018.

713. Similarly, another congressional committee was informed by the NCTA that: "*NCTA supports Congressional enactment of a constitutionally sound must carry law.* We believe that carriage of local broadcast stations by cable systems benefits these stations, cable operators, and—most importantly—the public." Source: "Hearings on Cable Television Regulation (Part 2)" at 129 (Statement of James P. Mooney); CR VOL. I.I, EXH. 16, CR 06296.

714. The record indicated: "I believe cable must be willing to adjust the rules of broadcasters-cable competition from time to time in recognition of changing realities in the marketplace and in technology. Consequently, I favor reimposition of 'must carry' rules and acceptance of an 'on-channel' standard, where technically feasible, for broadcast placement on cable channel alignments."

Source: "Oversight Hearings" at 39 (Statement of John Malone); CR VOL. I.E, EXH. 10, CR 02763.

715. Congress was told: "I want to assure you that Time Inc. is committed to the carriage of local broadcast signals and strongly supports NCTA's current efforts to negotiate a statutory embodiment of must-carry." Source: "Hearings on Competitive Problems" at 157 (Statement of Gerald M. Levin); CR VOL. I.H, EXH. 14, CR 05090.

716. The NCTA advised Congress that: "NCTA agrees with this Committee's desire to reinstate must carry. . . ." Source: "Oversight Hearings" at 15 (Statement of James P. Mooney); CR VOL. I.F, EXH. 11, CR 03461.

717. Congress was also told that: "[T]he cable industry for five years consistently held itself out as ready and willing to work with the principal representatives of the broadcast industry to produce reasonable must carry rules that would not unduly burden the rights of cable Source: "Hearings on Cable Television Regulation" at 806-07 (Statement of James P. Mooney); CR VOL. I.J, EXH. 18, CR 07810-11.

IX. EVIDENCE THAT THE MUST CARRY REQUIREMENTS CONGRESS CHOSE TO IMPOSE WERE BETTER CALCULATED TO ACHIEVE ITS OBJECTIVES THAN ALTERNATIVE REGULATORY APPROACHES.

A. Evidence That The Use Of A/B Switches Is Not A Realistic Alternative.

1. *The Cable Industry, As Well As The Broadcast Industry, Has Recognized That A/B Switches Are Not A Workable Or Appropriate Solution.*

718. The following research by the NCTA's Engineering Committee was in the record:

"NCTA's study also indicates that the mandatory universal installation of A/B switches pursuant to the Commission's rule will create significant technical problems for cable subscribers and the general public. Most seriously, the study suggests that widespread installation of switches is likely to result in increased signal leakage. In particular, according to the study, it can be expected that in many cases switches sent to subscribers for self-installation will (notwithstanding the instructions sent with the switch) be connected incorrectly. As a result, cable signals may be radiated over the subscriber's antenna at high gain, threatening harmful interference with other services, including those serving commercial aviation. Another switch-related problem identified by the NCTA study involves the deterioration of the signals received by cable subscribers. Many cable subscribers will find that they suffer significant signal quality degradation due to poor isolation between the 'A' and 'B' sides of their switches. Finally, in a growing number of cases, compliance with the Commission's A/B switch rule will inconvenience cable subscribers by rendering ineffective certain features of their television sets, VCRs, and cable converters. The Commission observes that these problems can be overcome by 'minor' equipment modifications and by an increase in the availability of sets with built-in switches. *Report and Order,* paras. 166-67. In fact, however, the development of readily available solutions to the technical problems described does not appear imminent. Although electronic switches, such as those occasionally built into top-of-the line television receivers and cable converters, do not suffer from some of the technical drawbacks of stand-alone mechanical switches, the technologies utilized in an electronic switching device are not, as a practical matter, transferable to a stand-

alone device. Moreover, it is likely to take several years before an apreciable number of consumers have receivers and converters with built-in switching capability. In the meantime, cable operators and their subscribers will have spent millions of dollars installing technically deficient switches."

Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 6-8 (Dec. 17, 1986); CR VOL. I.DD, EXH. 183, CR 16731-33.

719. The record included the following information: "The NCTA Engineering Committee report indicates that the financial impact of the Commission's switch rule will be prohibitively expensive. Focusing on the mandatory and universal character of that rule, NCTA's report concludes that the cost of the switches and connecting hardware alone will be nearly $1.4 billion. While NCTA did not specifically calculate the additional labor expenses related to the installation of switches and the additional material expenses related to the purchase of antennas, it is safe to say that the inclusion of these costs will increase the total price tag of the new rulesby additional *billions* of dollars." Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 5-6 (Dec. 17, 1986); CR VOL. I.DD, EXH. 183, CR 16730-31.

720. The record indicated: "According to new information developed by NCTA, however, there are good reasons to believe that the Commission is mistaken in this regard. More specifically, immediately following the announcement of the new rules last August, NCTA's Engineering Committee undertook an investigation of the financial and technical ramifications of the specific A/B switch approach adopted by the Commission. The results of that investigation are contained in a detailed report, a copy of which is attached hereto. That report demon-

strates that compliance with the Commission's A/B switch will be prohibitively expensive; that currently available switches will unavoidably cause serious technical problems and confuse the public; and, most importantly, that the economic and technical costs of the Commission's A/B switch approach are not justifiable." Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 5 (Dec. 17, 1986); CR VOL. I.DD, EXH. 183, CR 16730.

721. The record also indicated: "One point on which the broadcasters and most cable operators agree is that so-called 'A/B switches' are not a responsible, effective or adequate means to assure consumer access to local television stations. In fact, the National Cable Television Association has prepared an exhaustive engineering analysis which demonstrates that A/B switches frequently fail, wear out quickly, and would pose a threat to both consumer safety and air navigation (because of increased signal leakage on aeronautical frequencies)." Source: "Hearings on Must Carry" at 80 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04090.

722. The record indicated: "It is worth noting that the A/B switch is not a substitute for cable access. While both the Courts and the FCC appear to have embraced this purported solution, the record evidence proves that the A/B switch simply *does not work*. In fact, both the broadcasting and cable industries agreed that the A/B switch was not a viable solution to the problem. *See Joint Petition for Reconsideration by NAB, NCTA and CATA* filed in MM Docket No. 85-349 December 17, 1986; *Joint Request for Stay Pending Reconsideration filed by NAB, NCTA and CATA* in MM Docket No. 85-349, December 17, 1986." Source: "Hearings on Cable Television Regulation" at 901 n.84 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07905.

2. *Evidence That A/B Switches Are Not Effective Without Antennas, And That Most Cable Television Households Do Not Have (And In Many Cases Are Not Permitted To Have) Antennas Necessary To Receive Broadcast Television Signals.*

723. The record indicated: "Apart from the costs, an A/B switch is only effective if it is connected to an antenna. On numerous occasions INTV has provided evidence that the A/B switch is not an effective alternative in areas where natural terrain or buildings impede off-air reception. In addition, zoning regulations and restrictive building covenants prevent the installation of outdoor antennas. For many cable subscribers, an A/B Swith is not a realistic alternative." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 120 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08441.

724. The record included the following information: "The purpose of the A/B switch rule is to ensure that cable subscribers have access to off-air reception of local *VHF* signals not carried by the system. However, if a subscriber does not have an antenna for off-air reception, the A/B switch will be totally superfluous. There are a number of situations in which a subscriber might not have an antenna for off-air VHF reception. For example, some communities have zoning regulations which, for aesthetic reasons, bar the erection of external television antennas. While set top antennas are, of course, commonplace and readily available, some consumers may not appreciate the 'clutter' of yet more equipment attached to their television sets or may feel that the off-air reception provided by set top antennas is inadequate. Other subscribers (such as apartment dwellers who previously relied on MATV or SMATV), may never have had an antenna of any kind."

Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 21-22 (Dec. 17, 1986) (Appendix A); CR VOL. I.DD, EXH. 183, CR 16759-60.

725. The record indicated that:

> "Most cable subscribers would not have access to local broadcast signals if those signals were not carried on local cable systems. A national survey of cable households concerning antenna use and other factors related to the availability of local broadcast signals to cable subscribers revealed:
>
> * Only about 1% of cable subscribers currently have an outdoor antenna and an A-B switch;
>
> * 98% of cable homes do not have roof top antennas connected to their cable sets;
>
> * Well over half of all cable subscribers—57%—have never had an outdoor antenna;
>
> * 43% of cable subscribers who had an outdoor antenna took it down because of their belief that cable made them unnecessary;
>
> * 18% of cable subscribers may not be able to have an outdoor antenna because of local ordinances or other reasons."

Source; Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. (May 16, 1990) (Appendix H) (citing ELRA Group, Inc., Jan. 28, 1986, "Outdoor Antennas, Reception of Local Television Signals and Cable Television"); CR VOL. I.L, EXH. 22, CR 08828.

726. The following information was in the record: "Even if A/B switches worked, they would be of absolutely no use to the millions of consumers who have no access to an effective antenna for off-air reception. Millions of Americans who live in our urban concrete canyons, areas with terrain obstructions or in areas with zoning restrictions have no effective antenna to which an A/B switch could be connected." Source: "Hearings on Must Carry" at 80 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04090.

727. The record included the following information:

> "In many communities served by cable, rooftop antennas are prohibited or restricted by covenant, by-law, condominium rule, lease provision or other restriction. In many instances cable subscribers would be unable to install rooftop antennas for off-air reception even if they wanted and could afford to do so. Rooftop antennas may be prohibited altogether, as they currently are in Burke Centre, Prince William County, VA; Dunn Loring Village, Fairfax, VA; St. Charles Communities, Charles County, MD; and Mililani Town, Oahu, HA, to name but a few examples. Other communities require that prior written approval be obtained from a board or committee, as in Saddle Ridge, Silver Spring, MD; Fairlington Villages, Arlington and Alexandria, VA; Dorsey's Search Village, Howard County, MD; Oak Mills Village, Howard County, MD; Hickory Ridge Village, Howard County, MD; Kings Contrivance Village Covenants, Howard County, MD; Owen Brown Village, Howard County, MD; and Montgomery Village, Montgomery County, MD. In some cases, home-owners and tenants must show hardship or special need. Many communities 'strongly encourage' the use of indoor antennas. In other locations, installing an antenna requires paying a fee and/or going through the process of obtaining a permit before-hand."

Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 21-22 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16181-82.

728. The record included the following:

> "Surveys by others show that few cable homes have outdoor antennas available. Where they exist at all, the median age is twelve years. The deterioration of antennas and transmission lines with time is substantial and the effort needed to provide the ability to switch from cable to antenna is often beyond the capability of the householder. The consequence is that few cable viewers have a viable alternative to cable.
>
> Where indoor antennas must be relied upon, antenna and transmission line deterioration are eliminated by the significantly poorer performance of the indoor antenna, complicated by the difficulty of incorporating a satisfactory switching system, again results in the display of a markedly inferior picture to that available from cable or, in some cases, no usable picture. Contributing to the difficulty is not only the noise ('snow') resulting from poor signal strength, but also multiple images ('ghosts') typical in most urban locations."

Source: Jules Cohen & Asociates, P.C., Consulting Electronics Engineers, "Engineering Statement on Behalf of Television Operators' Caucus," submitted in MM Docket No. 85-349 at 2; CR VOL. I.AA, EXH. 158, CR 15763.

729. The record indicated that: "Recent research conducted by the ELRA Group for NAB and detailed in NAB Exhibit 1 reveals that hardly any cable subscribers now are equipped to use an A/B switch to obtain local signals. Only one percent now have an outdoor antenna and an A/B switch. Three fourths of cable subscribers have no access to any outdoor antenna, either

because they never had one, were told by their cable operator they would not need it any longer, or because they took down their antennas in reliance upon cable delivery of local signals. In communities of all sizes across the nation, outdoor antennas are prohibited or restricted. And for the one third of cable homes which now have video cassette recorders and the growing number with cable-ready sets, use of switches would be exceptionally difficult." Source: Comments of the National Association of Broadcasters in M MDocket No. 85-349 at ii (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16157.

730. The record also indicated that:

> "The usefulness of outdoor antennas to cable subscribers wishing ot receive local stations over-the-air is also greatly exaggerated by the cable industry. First, fewer than 24 percent of the 610 cable subscribers interviewed in the ELRA study currently have an outdoor antenna in place, and most of these antennas are more than 12 years old. Indeed, over 30 percent of the subscribers who had ever had an outdoor antenna were told that upon subscribing to cable they would no longer need an antenna, and over 42 percent of subscribers who once had an antenna but removed it reported that they did so because cable service made the antenna unnecessary."

Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 75-76 (Jan. 29, 1986); CR VOL. I.BB, EXH. 162, CR 15903-04.

731. The record indicated that:

> "In many communities served by cable, rooftop antennas are prohibited or restricted by covenant, by-law, condominium rule, lease provision or other restriction. *See*, comments of the lease provision or other restriction. *See*, comment sof the National Association of Broadcasters, MM Docket No. 85-

349, January 29, 1986, pp. 21-23 (relevant pages attached hereto as Appendix H-2). San Diego, California, for example, 85% of all homes have been built with zoning regulations, restrictions and/or covenants that prohibit the ability of residents to put up outside antennas."

Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess., Appendix H at 1 n.2 (May 16, 1990) ("First Amendment Analysis of a Must Carry Statute," by P. Cameron Devore); CR VOL. I.L, EXH. 22, CR 98828.

732. The record included the following:

"For many subscribers, the best reception of over-the-air signals will be obtained through the use of roof-top antennas. However, most cable subscribers do not own such antennas. In responce to PCTA's survey, Donald B. Herold of Millersburg TV Company reports that 'maybe a dozen of our 3700 plus subscribers may have antennas at their homes.' Mr. Herrold replied that most of the Millersburg subscribers 'were so glad to get rid of their antennas at time of connection to our system that I don't think they would ever consider putting one back up, even for a free A/B switch.' Thomas E. Freemen of Mansfield Video Systems, Inc. of Mansfield, PA reported that 'a conservative estimate of 90% of homes in our cabled area do not have a functional UHF or VHF antenna.'"

Source: Peittion for Reconsideration by Adelphia Communications Corp. et al., in MM Docket No. 85-349 at 33 (Jan. 12, 1987); CR VOL. I.DD, EXH. 184, CR 16898.

733. The record indicated that: "For the past fifteen years, 85% of all homes built in our ADI area (San

Diego) have been built with zoning regulations, restrictions and/or covenants that prohibit the ability of residents to put up outside antennas. With few exceptions all utilities including electric and telephone lines are placed underground in housing developments." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 1 (July 8, 1988) (Letter from James M. Harmon); CR VOL. I.Y, EXH. 128, CR 14964.

734. The record included the following research:

"Working in the Collin County clerk's office, the author reviewed all deed restrictions recorded in the county between June , 1986 and March 1, 1987. A total of 35 CC&R documents for residential developments were recorded during that period. Of the 35, 11 prohibited all outdoor antennas, 10 others permitted one radio or television receiving antenna while banning all other antennas, and 5 imposed severe height limitations (*e.g.*, no antenna more than 5 feet above the roof line). The other nine-most of them rural subdivisions with very large lots far from the Dallas suburbs—had no antenna restrictions."

Source: Comments of the American Radio Relay League, Inc. in Response to Notice of Inquiry in MM 88-138 at 18 (July 8, 1988) (Statement of Dr. Wayne Overbeck); CR VOL. I.Z, EXH. 132, CR 15225.

735. The record included the following information:

"A total of 18 new developments of single-family homes or condominiums in Contra Costa County were advertised in various Bay Area newspapers. Deed restrictions applicable to all 18 developments were inspected. Only 3 of the 18 permitted outdoor antennas without restriction. In a fourth tract, each homeowner was authorized to have a single outdoor television antenna until cable television service be-

came available; outdoor antennas were to be forbidden thereafter. Among the other 14 developments, 9 flatly prohibited all outdoor antennas while the remaining 5 permitted outdoor antennas only with express prior authorization of an architectural committee or homeowner's association governing board. It was noted that not a single outdoor antenna has been installed at any home in any of these five developments, although all five included neighborhoods that had been occupied for at least one year.

Thus, outdoor antennas were effectively barred by deed restrictions, in 14 of 18 new housing developments in Contra Costa County, and they were to be prohibited in a 15th as soon as cable service became available."

Source: Comments of the American Radio Relay League, Inc., in Response to Notice of Inquiry in MM 88-138 at 17 (July 8, 1988) (Statement of Dr. Wayne Overbeck); CR VOL. I.Z, EXH. 132, CR 15224.

3. Evidence That Signal Quality Issues Made A/B Switches An Ineffective Alternative.

736. The following information was in the record: "As shown by a recent study submitted with the Comments of TOC in this proceeding, indoor antennas often deliver reception which is markedly inferior to that provided by a cable system, even in such relatively flat and obstruction-free locations as the Washington, D.C., metropolitan area. The Commission has recognized that, as a practical matter, a signal can be received only at a level of quality that is inferior to that of other channels." Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 13 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16173.

737. The record also included the following information:

"In many American communities there simply is no off-air reception to switch to, due to features of the terrain (even including foliage). There, cable delivery is the only way, as a practical matter, to receive broadcast television service. This is true in large cities, as documented by the City of New York in its October 23, 1985, *amicus curiae* brief in suport of the NAB petition for writ of certiorari in the *Quincy* case:

'Modern cable television systems are capable of accomplishing many communications objectives. But their original function was, and a fundamental purpose remains, to facilitate the reception of local broadcast television signals. In many parts of the City, for example, and particularly in the Borough of Manhattan—where cable franchises were first granted by the City in 1970—broadcast television reception is often of poor and frequently unviewable quality because of the 'ghosting' effect resulting from tall buildings.'

Indeed, the City first granted cable franchises for Manhattan primarily to facilitate the clear reception of local broadcast television signals. . . .'

Brief of City of New York at 7. Outside cities, off-air reception is also a practical impossibility in many parts of the country characterized by mountainous or hilly terrain."

Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 11-12 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16171-72.

738. The record included the following information:

"Engineering tests have shown that even those switches designed by their manufacturers to provide

> 90 Db isolation frequently fall short of this level in practice. Even if a new switch initially meets manufacturer specifications of 90 Db isolation, after as little as six months of use, corrosion of terminating resistors will likely degrade the switch's isolation performance. Thus, it appears that no currently available A/B switch would provide over time the necessary level of isolation to ensure that picture quality is preserved."

Source: Petition for Reconsideration by Adelphia Communications Corp et al., in MM Docket No. 85-349 at 28-29 (Jan. 12, 1987); CR VOL. I.DD, EXH. 184, CR 16893-94.

739. The record indicated that: "Even in the small number of cases where A/B switches will be useful to subscribers few A/B switches will provide adequate isolation of the over-the air and cable signals. Where isolation is inadequate, signal quality will deteriorate and subscribers will be dissatisfied." Source: Petition for Reconsideration by Adelphia Communications Corp et al., in MM Docket No. 85-349 at 27-28 (Jan. 12, 1987); CR VOL. I.DD, EXH. 184 CR 16892-93.

740. The record indicated that: "In sum, any station not carried by cable will be severely disadvantaged in cable homes. If no 'A/B switch' is provided or used, the station will lose all access to cable subscribers, and the subscribers will lose all access to the station. In many homes, the same tota loss of access would occur even with an A/B switch, such reception will in most cases be markedly inferior to that provided on cable channels." Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 32-33 (July 8, 1988) (Appendix G); CR VOL. I.Y, EXH. 128, CR 14941-42.

741. The record also indicated that: "The significance of these results is clear. While television viewers will

watch an inferior off-air signal when no alternative is available, viewers will not generally watch an inferior signal when high quality signals are readily at hand. This has been demonstrated repeatedly where UHF and VHF stations offering substantially equivalent programming compete in intermixed markets." Source: Comments of the National Assoication of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 31 (July 8, 1988) (Appendix G); CR VOL. I.Y, EXH. 128, CR 14940.

4. *Evidence That Viewers In Cable Households Are Not Willing To Use An A/B Switch.*

742. The record indicated that: "According to the 1986 ELRA study, 10% of cable homes had the capability to switching back and forth between cable and off-air stations. However, only 15% of these households or 1.5% of all cable homes actually used the switch. The recent 1991 survey found that only 16% of all cable households have A/B switches that are connected to an outside antenna, and only 6% of all cable households have actually used the switch at least once. Thus, 94% of all cable households do not use an A/B switch to access local signals." Source: Comments of the Association of Independent Television tSations, Inc. in M.M. Docket No. 90-4 at 121-22 n.212 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08442-43.

743. The record included the following results of the study of "A-B Switch Availability and Use," by Dr. Mark R. Fratrik, a Vice President and Economic at the National Association of Broadcasters:

> "In 1986, as part of the Interim Rules concerning the carriage of local broadcast signals, the FCC included a set of rules on the provision of A-B switch by local cable systems. These rules included the requirement that cable systems offer these switches and how to use them.

This study examines the prevalence of these switches among cable households and the amount that they are used for years after the rules came into effect, during most of which time there has been no must carry rules. . . .

. . . [O]f *all cable households,* only 16% have A-B switches and are attached to an outside antenna. With respect to *all cable connected sets,* only 11.7% are attached to outside or set-top antennas and have an A-B switch.

Finally, to get a sense of how much these switches are used, we asked cable subscribers who have the switch if they ever have used that switch. Only 38% of that small group responded yes, with 58% saying no. The group that have used the switch only corresponds to 6% of all cable households.

. . . What these results show is simply that after several years of a government mandated program of providing A-B switches consumers and aa simultaneous education program on their use, there is still not a significant number of A-B switches in use in cable subscribing households."

Source: M. Fratrik, "A-B Switch Availability and Use," at 3-4 (Sept. 23, 1991), appended to Comments of the National Association of Broadcasters in MM Dock. No. 90-4 (Sept. 25, 1991); CR VOL. I.Q, EXH. 71, CR 11020-21.

744. The record included the following information:

"While the FCC's post-*Quincy* must-carry rules had provided for an input selector switch (the A/B Switch) to permit cable subscribers to be able to switch from cable to over-the-air television, this requirement were resurrected in some manner as a supplement or substitute for must-carry, it would provide little, if any, practical relief to local broadcasters. iWth the up to 104 channels available on cable with superior reception, the subscriber's incentive to install an A/B Switch to receive (if at all) an off-the-air signal on an indoor antenna would be negligible."

Source: "Hearings on Competitive Issues" at 721-22 (Memorandum Re: Joint Comments of the Monopoly of Cable Television Systems and the Demise of Independent Free Television (March 17, 1988)); CR VOL. I.C, EXH. 8, CR 02060-61.

745. The record indicated that:

"While it is possible that a cable subscriber will retain an operational antenna and ensure the installation of an A/B switch to select between an off-the-air signal or cable signal, as a practical matter very few subscribers will do so.

First, no cable systems routinely install A/B switches, and subscribers themselves are not allowed to tamper with a cable company installation. Second, having committed themselves to a monthly charge to receive a large number of TV channels, few persons will be inclined to spend additional money to install, or retain in working order, another antenna system that will receive a few additional signals off-the-air which will probably be of significantly lesser picture quality. Indeed, cable operators have been known to offer to remove outside antennas as an inducement to new subscribers."

Source: Comments of State Public Broadcasting Networks in MM Docket No. 85-49 at 15-16 (Jan. 29, 1986); CR VOL. I.CC, EXH. 166, CR 16243-44.

746. The record included the following information:

"As we noted in our initial comments, cable subscribers simply won't use the switch. The A/B switch rules absolutely ignore consumer viewing

patterns and behavior. 'The growth of the cable television industry has led to a user-*unfriendly* environment for the average television viewer. A viewers living room will likely include a confusing array of multiple wires and cable interconnecting his television receiver, cable television converter, videocassette recorder, and possibly an outdoor antenna. . . This uncoordinated and unstructured proliferation of signal sources has led to a multiplicity of set-top converters, other black boxes and interconnecting cable whose instalaltion and use may be beyond the ken of some engineers, let alone the average viewer viewer.' "

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 40 (Oct. 25, 1991) (Quoting comments of Richard S. Leghorn, in MM Docket No. 90-4, at 22-23); CR VOL. I.Q, EXH. 81, CR 11398.

747. The record indicated that: "The realities of television viewing in an age of remote controls makes switching an unlikely possibility. Audiences tend to graze through and witch those stations that are easily accessible." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 124 n.215 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08445.

748. The record included the following:

"Moreover, the FCC cannot ignore the real behavior of television viewers. In an age of remote controls, the average television viewer remains content to graze among the channels carried on the cable system. The Commission can certainly criticize the 'couch potato' mentality of viewers. However, consumer behavior is the essence of the television business. The networks spend millions of dollars every year to develop program lineups that will keep viewer

'on the couch' and discourage them from switching channels. Many of the Commission's rules, such as PTAR, are specifically designed to ensure that programming appears at a time where there is high television viewing.

Assuming arguendo that the A/B switch works technically, forcing television viewers to engage in 'extra' activity to access local broadcast signals has direct competitive consequences. It creates a 'screen bias' for those broadcast stations and cable program services that appear on the system."

Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 120-21 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08441-42.

749. The record indicated that: "At the beginning of this debate, in 1986, NAB submitted evidence that only 1.5% of cable subscribers possessed and used an A/B switch to retain access to off-air signals. [Citing ELRA Group Inc. 'Outdoor Antennas, Reception of Local Television Signals and Cable Television,' January 28, 1986.] A recent survey conducted by NAB demonstrates that 94% of cable subscribers do not have and/or do not use an A/B switch for the purpose of accessing local broadcast signals." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 121-22 (Sept. 25, 1991) (citing NAB, 'A-B Switch Availability and Use' September 23, 1991); CR VOL. I.K, EXH. 21, CR 08442-43.

750. The record included the following:

"The existing state of affairs was accurately described in the Comments of Richard Leghorn:

'External switch devices installed by the cable operator or subscriber only add to the clutter of equipment and cables attached to the viewer's television receiver. . .

Furthermore, by declining to require that switches be built into receivers, the Commission failed to take any action that would realistically lead to the widespread adoption and use of such switches. Little has been accomplished by the current notice requirement. Predictably, few subscribers read these notices and fewer still understand them and have a switch installed.' "

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 39-40 (Oct. 25, 1991) (citing Comments of Richard S. Leghorn at 22-23); CR VOL. I.Q, EXH. 81, CR 11397-98.

5. *Evidence That Installation And Maintenance Of A/B Switches Involves Significant Expense.*

751. The record included the following:

"I have reviewed data compiled by the Racine system on usage of mechanical A/B switches during the period from 1979 through 1985. During this period, the annual mechanical A/B switch replacement rate ranged from 40.8 percent (in 1979) to 25.6 percent (in 1980). The average mechanical A/B switch replacement rate for the entire period was 33.2 percent. We estimate that two-thirds of these replacements were due to switch failure.

The system used several different types of A/B switches during the period. The price of these switches, purchased in lots of 10,000 ranged from $3.34 to $4.30, with an average cost of $3.80. The system currently pays $4.30 per switch in lots of 10,000.

The majority of mechanical switches installed during the period 1981-1985 were manufactured off-shore and were of the 'RCA'-type design. These switches,

which are equipped with impact resistant cases, heavy-duty push button detent mechanisms, and gold-plated contacts.

The most common A/B switch failure modes involve mechanical malfunction leading to intermittent operation. Switch failure is by far the largest cause of service disruptions. We estimate the cost of a service call to replace an A/B switch to be $20.00."

Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 1-2 (Dec. 17, 1986) (Appendix A, Attachment 1, Affidavit of Nicholas E. Worth); CR VOL. I.DD, EXH. 183, CR 16770-71.

752. The record included the following:

"I have examined A/B switch usage by the Napa system between January 1981 and August 1986. During that period, the system had an average of 15,650 subscriber sets in use with A/B switches. Approximately 4,200 A/B switches were replaced annually, representing about 27 percent of the installed subscriber base.

The failure mode requiring replacement f an A/B switch normally was intermittent contacts due to corrosion or wear. The cost of a service call to replace a malfunctioning switch is estimated at $25.00.

It has been our experience that switches not only result in additional costs due to failure, but also that the installation of the switch causes consumer confusion and dissatisfaction, particularly where the subscriber has a VCR."

Source: Joint Petition for Reconsideration, filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 1-2 (Dec. 17, 1986) (Appendix A, Attachment 1, Affidavit

of Joseph E. Van Loan); CR VOL. I.DD, EXH. 183, CR 16768-69.

753. The record indicated that: "It is worth noting that the incredible replacement costs for malfunctioning A/B switches ($540 million) provides strong evidence that the switches are technically unreliable." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90-4 at 117 n.207 (Sept. 25, 1991); CR VOL. I.K, EXH. 21, CR 08438.

754. The record indicated that:

> "Although the wide range of possible instalaltion scenarios makes cost estimates necessarily imprecise, the Engineering Committee anticipates that, in most instances, the equipment expense of complying with the A/B switch rule will be at least $5.00 per subscriber set, with the cost reaching $10.00 or more in a growing number of cases. On an industry-wide basis, the Committee projects that the capital expense of the installation of A/B switches in new and existing subscriber homes will exceed $860 million dollars over the next five years."

Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 2-3 (Dec. 17, 1986) (Appendix A, "The A/B Switch Requirement: A Report by the NCTA Engineering Committee); CR VOL. I.DD, EXH. 183, CR 16740-41.

755. The record included the following: "The susceptibility of switches to failure will do more than create a mere inconvenience for cable subscribers; it will increase the total capital cost involved in complying with the A/B switch rule to nearly $1.4 billion dollars during the next five years. Switch failures also will lead to an upsurge in the number of customer service calls. The cost of these service calls (at between $20.00 and $30.00 each) will add billions of dollars to the overall financial burden attributable to the A/B switch rule." Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 3 (Dec. 17, 1986) (Appendix A, "The A/B Switch Requirement: A Report by the NCTA Engineering Committee); CR VOL. I.DD, EXH. 183, CR 16741.

756. The record also included: "The reasons for the lack of A/B switch penetration are understandable. The costs of purchasing and installing an A/B switch have proven to be up to six times the cost originally estimated by the Commission. Moreover, the bill stuffers provided by the cable system actually scare consumers away from installing an A/B switch and antenna themselves." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 39 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11397.

757. The record also included the following cost projections:

> "When considering amending the FCC's rules concerning carriage of television broadcast signals by cable television systems, the FCC considered ordering cable systems to supply subscribers with A/B switches so that subscribers could view any over-the-air broadcasts that were dropped from the cable. The cost of complying with this requirement was estimated by the National Cable Television Association's Engineering Committee. The NCTA estimated that the hardawre cost (*i.e.*, the cost of the switch, signal splitters, matching transformers, terminators, and wiring) of complying with an A/B switch rule would be approximately $5.00 per subscriber set with no VCR and $10.00 per subscriber set with a VCR. NCTA estimated that the capital expense of the installation of A/B switches in new and existing subscriber homes would exceed $860 million over five years. In addition to the initial equipment cost, there would be replacement costs and service call

expenses associated with the A/B switch. NCTA estimates that capital costs associated with replacing defective A/B switches would be about $540 million over the next five years. Furthermore, NCTA states that the cost of service calls (estimated at between $20 and $30 per call) would add billions of dollars to the overall cost attributable to an A/B switch."

Source: Cable Television Regulation (Part 2): Attachments to NAB Testimony in Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, 101st Cong., 2d Sess. at 49 (May 16, 1990) (Economic Appendix to Reply Comments); CR VOL. I.K, EXH. 22, CR 08951.

6. *Evidence Of Serious Technical Problems Associated With A/B Switches.*

758. The record indicated that:

"A/B switches will not operate without great difficulty with an increasing number of television receivers. Exhibit 3 to these Comments is the technical analysis of NAB engineer Ralph Justus detailing the problem of the incompatibility of A/B switches and 'cable ready sets,' which during the first half of 1985 accounted for 65 percent of all color television receivers sold in the United States. Exhibit 3 details the multiple switchings, connections and reconnections that cable-ready set viewers would have to undertake the use an A/B switch, and indicates that no remotely controlled add-on A/B switches are currently available for any viewer, meaning a trip to the set and back is require deach time the switch is used."

Source: Comments of the National Association of Broadcasters in MM Docket No. 85-349 at 23-24 (Jan. 29, 1986); CR VOL. I.BB, EXH. 165, CR 16183-84.

759. The record also indicated that:

"Moreover, if the subscriber owns a newer 'cable-ready' television receiver, he cannot bypass the cable system to tune into local stations without additional and highly cumbersome adjustments. As explained in the attached affidavit of NAB telecommunications engineer Edmund A. Williams, cable-ready sets have become the choice of buyers of new television sets. The percentage of such new set sales rose from 45.6% in 1982 to 56.8% (9.6 million units) in 1984. These cable-ready or cable compatible television receivers, employing common UHF/VHF coaxial input, require as many as three separate switch actions by the television viewer to go from the cable mode to the off-air, antenna-connected mode of operation."

Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 73 (Jan. 29, 1986); CR VOL. I.BB, EXH. 162, CR 15901.

760. The following information was in the record:

" 'Cable ready' sets require the use of a special switch to go from cable mode to off-the-air frequencies mode; this switch is generally located on the back of the receiver or inside a door which contains seldom-used color adjustment or set-up controls, and in some cases a special tool is required to operate the switch (para. 5). In the cable mode the UHF antenna input is rendered useless (para. 6). In some sets, a separate automatic frequency control ("AFC") switch must be employed along with the aforementioned special switch when adjusting for a change from cable to normal receiver operation (para. 7). When an A/B switch is used between cable TV mode and an external antenna, as when a viewer is watching one channel while simultaneously recording another on a video-cassette recorder, 'the viewer

must, *in addition* to activating the A/B switch, also activate the cable/normal switch and, in some cases, the AFC switch as well' (para. 9)."

Source: Comments of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 73-74 n.92 (Jan. 29, 1986); CR VOL. I.BB, EXH. 162, CR 15901-02.

761. The record indicated that:

"Mechanical, stand-alone A/B switches of the sort that probably will be supplied in compliance with the Commission's rule are potentially 'consumer-unfriendly' devices capable of creating serious technical problems. For example, the installation of such switches is likely to result in increased signal degradation and signal leakage. Such switches also may inconvenience subscribers by rendering ineffective certain features of their television sets and cable converters. These problems flowing from the use of mechanical switches will be aggravated by the mandatory and virtually universal character of the Commission's A/B switch rule, which guarantees that switches will be installed in many homes where they are not needed and will not be properly used. Nor is there any readily available solution to these problems. Although electronic switches, such as those being built into certain television sets and cable converters, are not subject to many of the technical flaws of mechanical switches, the built-in electronic switches utilize technologies that are not readily transferable to a stand-alone device."

Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 3-4 (Dec. 17, 1986) (Appendix A, "The A/B Switch Requirement: A Report by the NCTA Engineering Committee); CR VOL. I.DD, EXH. 183, CR 16741-42.

762. The record indicated that:

"I have reviewed the number of switches replaced in the Castro Valley system during the period January 1985 through August 1986. During this period, the average number of subscriber sets connected to the system was 12,352. Based on the number of switches purchased and the number of new installations and reconnects, I estimate that the number of replacement switches installed was approximately 6,345, representing 54 percent of the average sets connected. On an annual basis, this represents a replacement rate of 32.4 percent.

The most commonly reported reason for replacing A/B switches is intermittent contacts. Worn switches also cause problems with premium channels utilizing sync suppression encoding, resulting in service calls."

Source: Joint Petition for Reconsideration (filed by NAB, NCTA and CATA) in MM Docket No. 85-349 at 1-2 (Dec. 17, 1986) (Appendix A, Attachment 1, Affidavit of Steve Hubbard); CR VOL. I.DD, EXH. 183, CR 16764-65.

763. The record included the following information:

"In summary. (1) a systematic approach to mating cable TV with television receivers combined with the ability to receive off-air signals is exceedingly difficult to characterize; (2) there is rapidly increasing trend toward using a common coaxial VHF/UHF receiver antenna input; (3) the need for the consumer to activate selector switches (often hard to locate increases the difficulty of combining off-air reception with cable hook-ups; (4) alternative input or built-in A/B switches are available only on special or top-of-the-line receivers; and (5) considerable confusion exists not only with VCR tuning systems but also with their hook-up arrangements with cable TV systems and off-air antennas."

Source: Petition for Reconsideration of Association of Independent Television Stations, Inc. in MM Docket No. 85-349 at 6-7 (Jan. 7, 1987) (Attachment 1, Affidavit Edmond A. Williams); CR VOL. I.DD, EXH. 189, CR 17016-17.

764. The record also included evidence that:

> "If an A/B switch is installed improperly or insecurely, cable signals may be radiated through the subscriber's over-the-air antenna into the atmosphere at a high gain, violating the FCC's signal leakage rules and threatening interference with other services, including air navigation safety and other critical communications. Furthermore, a noted by Glenn W. Witner, Director of Technical Development of SBC Cable Company in response to PCTA's survey, 'if the switch becomes defective there is potential for coupling the CATV signal into the subscriber antenna even when wired properly.'
>
> In addition, even if A/B switch installation is properly configured, loose fitting (which may be unavoidable over time) may cause a problem in this regard. Daniel L. Wynen of American Television and Communications Corporation's BerksCable system in Reading, PA had advised the Commission that this problem poses 'a high risk situation.' *See* Letter from Mr. Wynen to Mr. James C. McKinney dated December 8, 1986."

Source: Petition for Reconsideration by Adelphia Communications Corp et al., in MM Docket No. 85-349 at 30 (Jan. 12, 1987); CR VOL. I.DD, EXH. 184, CR 16895.

765. The record indicated that:

> "A/B switches will also operate only with great difficulty with 'cable ready sets' which during the first have of 1985 accounted for 65% of all color television receivers sold in the United States."

Source: Reply Comments of the National Association of Broadcasters in MM Docket No. 89-600 at 2 (April 2, 1990) (Appendix H); CR VOL. I.W, EXH. 118, CR 13987.

766. The record included the following:

> "Furthermore, serious questions have been raised as to the effects of A/B selector switches on the technical quality of over-the-air, local television station service. The Association of Maximum Service Telecasters, Inc. ('MST') filed engineering studies in MM dockets No. 85-349 and 87-107 addressing the adverse effect of these switches on the quality of broadcast television service. MST's engineering studies demonstrate that A/B switches have the potential for creating serious interference to broadcast television service."

Source: Comments of Group H Broadcasting Corp. in MM Docket No. 88-138 at 9 (July 8, 1988); CR VOL. I.Z, EXH. 133, CR 15234.

767. The record also indicated that:

> "With the increasing use of video cassette recorders, the problems associated with the installation of A/B switches will become increasingly complex. Cable operators are required to provide existing subscribers with the option of self-installation. It can reasonably be expected that many, if not most, subscribers will attempt to install their own switches in order to save some money. These complex installations may be difficult for many subscribers, and will increase the risk of signal degradation and signal leakage (as demonstrated above). As noted by Ronald J. Risley of Harron Communications of Millville, NJ, 'many of our subscribers use an A/B switch for recording on their VCR's and the addition of another switch would only create a confusing

situation which would generate a subscriber complaint.' "

Source: Petition for Reconsideration by Adelphia Communications Corp. et al., in MM Docket No. 85-349 at 32 (Jan. 12, 1987); CR VOL. I.DD, EXH 184, CR 16897.

7. *Further Evidence Confirming That A/B Switch Requirements Are Not A Suitable Alternative To Must Carry.*

768. The record indicated that:

"Both NAB and the cable industry have documented in FCC proceedings why the 'A/B switch,' a mechanism that ostensibly allows subscribers to select between cable and over-the-air reception, is in fact inadequate as a substitute for cable carriage of local stations. For many homes, this switch will not deliver adequate off-air reception, because the over-the-air signals are obstructed by tall buildings in urban areas, hilly terrain, or even faliage. Many viewers subscribe to cable in whole or in part to get better reception of local television signals.

Even where over-the-air reception of local signals is possible, nearly all viewers must use an outdoor antenna with the switch. In most cases, indoor antennas are inadequate.

NAB's 1985 survey of cable subscribers revealed that hardly any cable subscribers had A/B switches. Only 1% of subscribers had an A/B switch and an outdoor antenna. Many subscribers no longer had access to an outdoor antenna, either because they never owned one, they were told by the cable system that they no longer needed, one, or they (or their cable system) removed the antenna once they subscribed. In many communities, outdoor antennas are prohibited or restricted, or viewers live in multi-unit

buildings in which access to outdoor antennas is impossible or impractical. In addition, with increasing use of VCRs and other equipment that attaches to the television set, the installation and use of A/B switching devices has become exceptionally confusing and difficult.

In short, the overwhelming majority of cable subscribers would have to invest or reinvest in a costly and complex array of equipment to have access to local stations not carried by cable. Once the equipment was installed, cable subscribers would have to use it correctly each time they wanted to view stations not carried on cable, rather than merely time passively to whatever programming was on the cable. Cable systems thus have effective gatekeeper control over local stations' availability to the same viewers these stations are licensed to serve."

Source: "Hearings on Must Carry" at 38-39 (Statement of Edward O. Fritts); CR VOL. I.C, EXH. 8, CR 04048-49.

769. The record included the following:

"In any event, approximately three-fourths of cable homes have no access at all to any outdoor antenna, new or old. Even if such cable subscribers were to install A/B switches, they would be forced to use some type of indoor antenna as an alterantive to cable reception. These indoor antennas are typically 'rabbit ears' devices for VHF stations and simple wire loops for UHF stations.

The signals provided to television receivers by such indoor antennas are far weaker than the signals provided by a cable system. As explained in the Engineering Station (pp. 5-6):

'The best signals [from indoor antennas] would be expected to be at least 10 db below that obtainable from cable and the spread can be almost 30 db at

the upper end of the UHF band. (Stated in terms of power input comparison, the use of indoor antennas, in an area where the nearby field strength would be the equivalent of Grade A, would result in receiver input ten to one thousand times lower than that to be expected from a cable system.)'

Even these predicted signal levels for indoor antennas assume unobstructed reception of a television signal, a circumstance seldom obtaining in the real world, where serious reception problems are frequently created by terrain obstructions, buildings, and foliage. Owing to these real world difficulties, the signal strength actually delivered to a television set by an indoor antenna is likely to be far lower than that predicted on a theoretical basis. Moreover, and often more seriously, multiple images (ghosting) produced by reflected and diffracted signals tend to impair indoor antenna reception to a very significant degree. Engineering Statement, p. 6."

Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 27-28 (July 8, 1988) (Letter from E.W. Tucker); CR VOL. I.Y, EXH. 128, CR 14936-37.

770. The record included the following information about A/B switches:

"Virtually no homes—certainly fewer than one percent—have A/B switches that would enable them to use off-the-air antennas, if they had them. I believe that very few of WFAT's listeners have even heard of A/B switches, and, base don information and belief, I do not believe that the cable television companies make them aware that such devices exist. Even if cable subscribers were aware of A/B switches, relatively few would use them. A/B switches are difficult for laymen to install, they won't do any good in most cases unless expensive receive

antennas are also purchased and installed, and in many, perhaps most, cases they still will do no good because of terrain blocking of over-the-air broadcast signals."

Source: Comments of the National Association of Broadcasters, Appendix Volume, in MM Docket No. 88-138 at 2-3 (July 8, 1988) (Affidavit of George Plenderleith); CR VOL. I.Y, EXH. 128, CR 14716-17.

B. Evidence That Antitrust Litigation Is Not An Efficient Means To Achieve The Objectives Of The Must Carry Requirements.

771. The record included the following information regarding litigation against the cable industry: "Self help through private antitrust litigation is an imperfect and, under current law, an uncertain remedy for us. At best it is extremely costly and time consuming. On a case-by-case basis, when adequately funded Wireless Cable operators have pursued this route, they have sometimes succeeded. For an entire industry to rise or fall on private legal actions, however, is not much in the way of rational public policy, especially when there is an immediate need for increased competition in the marketplace." Source: "Hearings on Cable Television Regulation" at 300 (Statement of Robert Bilodequ); CR VOL. I.J, EXH. 18, CR 07305.

772. The record indicated that: "The important question to ask is: if existing antitrust laws are adequate to attach anti-competitive behavior, then why do we need legislation? The answer is, that, if, as a matter of public policy, you agree that there should be competition and consumer choice in the marketplace across the country, if you agree that there is a need for the different forms of distribution to be successful and get out there in the market, then it is not a very satisfactory solution to expect individual, entrepreneurial, start-up companies, who are relatively less well funded, to take on some of the coun-

try's largest companies on a case-by-case, market-by-market basis in antitrust litigation. That's why, although legal remedies are available, they ar not really completely satisfactory from an industry perspective, or indeed from a public policy perspective." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 306 (Statement of Robert L. Schmidt); CR VOL. I.I, EXH. 17, CR 06764.

773. The record also indicated that: "Litigation is, of course, an available remedy. But it is wholly unsuitable to the national interest in developing competitive cable. In most instances, resort to the judicial system is time consuming, not promising, expensively wasteful of resources that can be better employed in improving competitive cable service offerings, and is likely to produce spotty results." Source: Comments of Competitive Cable Association in MM Docket No. 89-600 at 15-16 (Feb. 27, 1990); CR VOL. I.S, EXH. 94, CR 11801-02.

774. The record included the following: "Other forums provide no meaningful remedies, as much as cable interests would like to deflect adoption of new rules. Antitrust and unfair trade practice litigation is inordinately expensive, especially for a station on the brink of failure or just beginning operation." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 30 (Oct. 25, 1991); CR VOL. I.Q, EXH. 81, CR 11388.

C. Evidence That Establishing Must Carry Requirements For All Cable Systems Within A Broadcast Station's Area Of Dominant Influence ("ADI") Is The Most Appropriate Standard Of Must-Carry Protection For Commercial Broadcasters.

775. The record included the following information: "[U]sing mileage limits to determine which signals are qualified for carriage may create anomalous results. Depending on a station's location within it market, it will not be qualified for carriage on some cable systems within its market and yet may be a must carry signal on cable systems serving subscribers in another market whose interests may not be served by the television station's programming.

Therefore, full power television stations should be qualified for inclusion in the carriage pool on all cable systems within their ADI."

Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 33 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10347.

776. The record included the following information:

"In establishing signal carriage rules, the Commission's goal must be to reflect the realities of the television market, thus ensuring that local broadcasters will have access through cable to the same viewers that they would reach over-the-air in the absence of the cable systems. As a practical matter, the viewers which a television station and its advertisers consider to be in its market are those viewers in the television station's Arbitron Area of Dominant Influence (ADI). The Commission in other contexts has shown its appreciation for the importance of ADI lines in defining television markets. For example, in calculating 'national audience reach' for application of the multiple ownership rules, the Commission uses the number of television households in a television station's ADI, recognizing that the ADI establishes the market. 47 C.F.R. § 73.3555(d)(3)(i). The Commission also uses ADI classification to determine waivers of the radio-television cross-ownership rules in the top 25 market. *Id.* n.7. Application of the prime time access rule also turns on ADI definitions. *Id.* § 73.658(k) n.1."

Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 31-32 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10345-46.

777. The record indicated that: "By focusing on the location served by the cable system, the proposed rules eliminate any disputes arising from changes in cable systems' headend locations. Determining the ADI in which a cable system is located should be straightforward in almost every instance. If there are cable systems which cross ADI lines, the system should be deemed to be in the ADI in which the majority of its subscribers are located." Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 33 n.38 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10347.

778. The record included the following information on changes in the television marketplace and the growing importance of the Area of Dominant Influence as the relevant area of competition (and the relevant area for obtaining cable carriage):

> "Increasingly, cable systems are joining interconnect arrangements which allow them to sell advertising across an entire ADI, duplicating local television stations, market reach. In 1986, the Cable Advertising Bureau reported only 57 interconnect arrangements, of which the largest two offered access to just over one million subscribers. By 1990, there were 101 cable interconnects, the largest of which—the New York Interconnect—claimed 3.1 million subscribers. That represented 82 percent of all of the cable subscribers in the New York ADI. Similarly, the Bay Area Interconnect offers advertisers access to 73 percent of all cable subscribers in the San Francisco ADI. Advertisers are told that interconnects 'offer the efficiency of developing a multi-system buy, *often an entire market*, in which only one contract need be negotiated.' If the stations in these markets are only carried by part of the cable systems in the ADI, they will be at a competitive disadvantage in selling the advertising time which is their only revenue source."

Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 32-33 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10346-47.

779. The record included the following: [3]

> "The lines developed by Arbitron attempt to replicate the traditional viewing patterns of television households. In addition, there is an annual update of ADIs which reflects changes in television viewing. There is little or no evidence that reliance on ADI designations has created a problem in FCC enforcement . . .
>
> Two principal areas of concern appear to be raised about ADI must carry provisions. The first is that situations would be entitled to carriage where they cannot be seen over the air; the second argument is that some stations would not be entitled to carriage in areas where they can be received over the air and have been traditionally viewed. Let us address each of these in turn.
>
> Although in the Western part of the country, some ADI's stretch far beyond the reach of an ordinary television signal, the choice to place counties into a particular ADI is not an arbitrary one, but reflects

[3] Exhibit 30 is a memorandum from Stephen Jacobs (NAB Vice President—Congressional Relations) and Jack Goodman (NAB Special Counsel) to Representative Dennis Eckart, dated June 10, 1992, that was produced in discovery in this litigation. If plaintiffs dispute that this was part of the record presented to Congress, defendants shall present an affidavit from Mr. Goodman establishing this fact.

the actual historical viewing pattern in those counties. . . .

Thus, ADI boundaries, albeit imperfect, are the most common definition of television markets. This fact is reflected in the FCC's multiple ownership rules. One group owner is restricted to controlling stations which serve no more than 25 percent of total television audience. The FCC used the number of television households in a station's ADI as the benchmark for determining the population the station serves.

Furthermore, the people in the remote parts of the ADI are part of the Denver market for programming and advertising purposes. When a Denver station purchases a program, it pays for the right to serve all of the households in the ADI. If the cable system in part of the ADI cuts it off in favor of a station from another market, part of the money the station paid for its programs will be wasted. Even more important, as an advertiser-supported medium, the ability to sell access to a predictable number of households is crucial to television stations' viability."

Source: Memorandum from S. Jacob & J. Goodman to Repr. Eckart (June 10, 1992); CR VOL. I.N, EXH. 30, CR 09712-13.

780. The record included the following information: "Cable systems increasingly sell advertising in the same way broadcasters do across entire television markets. In some markets, one MSO operates virtually all of the area cable systems and can easily sell block insertions across all of its systems. In markets where cable ownership is more diverse, the cable industry is rapidly developing interconnects which offer similar benefits to advertisers. In 1990, there were 101 cable interconnects in operation. The largest, the New York Interconnect, offers advertisers access to 3.1 million subscribers, 82 percent of all cable households in the New York ADI. The Cable Advertising Bureau promotes buys through interconnects since they 'offer the efficiency of developing a multi-system buy, often an entire market, in which only one contract need be negotiated.' A must carry regime which ignores television marketing patterns will permit cable systems to organize themselves for market-wide sales while preventing broadcasters from offering more than a patchwork of reception areas."

Source: Memorandum from S. Jacobs & J. Goodman to Repr. Eckart at 4-5 (June 10, 1992); CR VOL. I.N, EXH. 30, CR 09713-14.

781. The record also indicated the following problem with mileage based requirements:

"Another problem which is presented with mileage-based must carry rules is establishing the precise point to be measured to determine if a station is within a cable system's must carry complement. The FCC's short-lived interim must carry rules included all cable systems whose headends were located within 50 miles of the reference point of a station's community of license. This proved difficult to enforce as many cable systems appear to have multiple headends and some used this architecture to avoid signal carriage obligations. Last Congress' cable legislation sought to avoid this problem by requiring each cable system to designate to the FCC a 'principal headend' to be used in carriage determinations. The FCC was to be given authority to override designations which were made to diminish stations' must carry rights.

Basing must carry obligations on ADI boarders does away with this compliance problem. ADIs run along county lines. Most cable systems are similarly divided along municipal and county lines as they

are franchised by local communities. If the cable community is in a television station's ADI, the station will be entitled to signal carriage, regardless of where the cable operator chooses to process signals. Thus, the number of administrative disputes over carriage will be fewer than under a 50-mile standard."

Source: Memorandum from S. Jacobs & J. Goodman to Repr. Eckart at 6-7 (June 10, 1992); CR VOL. I.N, EXH. 30, CR 09715-16.

D. Evidence That Imposition Of A Viewing Standard Would Be Inconsistent With Congress' Policy Objectives And Would Be Inappropriate.

1. *Evidence That Carriage Of All Local Broadcast Stations Was Necessary To Insure Financing For Non-Established Stations.*

782. *See* Sources cited in VII.A.3. *supra.*

2. *Evidence That Carriage Of All Local Broadcast Stations Was Necessary To Insure The Continued Operation Of Those Stations, And To Maximize Their Potential For Future Growth And Programming Improvements.*

783. *See* Sources cited in Section VII.B.1 & VII.B.5 *supra.*

3. *Evidence That Restricting Must Carry Rights To Stations Meeting A Specified Viewing Standard Would Be Contrary To Its Objectives Of Maximizing Diversity And Protecting Vulnerable Broadcast Stations.*

784. The record included the following information from Turner Broadcasting Systems, Inc.:

"*No Nexus With Those Likely to be Harmed.*—Yet another flaw in the new regulations is that they do not reveal a link between mandatory carriage and the financial health of the stations whose signals are entitled to free carriage. Underlying the regulatory scheme is the fear that, in the absence of must-carry rules, local stations would be unable to survive in the short term, five years, until the A/B switch educational program was effective. But the new standards would have the opposite effect. Other than new UHF or non-commercial stations, only the most financially stable stations—those that satisfy the 2% and 5% viewership standards—would enjoy carriage rights. Yet these are precisely the stations that are already extensively viewed and are most likely to continue to be viewed without mandatory carriage regulations—and are the least at risk over the next five years. "This blanket protection, by sweeping even the most financially secure broadcaster under the rules' beneficent mantel, reaches well beyond the rules' asserted objective of assuring that the advent of cable technology not undermine the financial viability of community-oriented, free television."

Source: Petition for Reconsideration or, in the Alternative, Petition for Stay Pending Review, filed by Turner Broadcasting Systems, Inc. in MM Docket No. 85-349 at 18 (Jan. 12, 1987); CR VOL. I.DD, EXH. 194, CR 17119.

785. The record also included the following information: A viewing standard causes "great harm to a group of broadcast stations which can ill afford to bear any more disadvantage—independent television stations. Such stations, attempting to provide local viewers in most markets across the nation with alternative programming to that on the national networks, are especially hard hit by the viewing standards set by the Commission." Source: NITC's Petition for Reconsideration in MM Dock. No. 85-349 at 4-5 (Jan. 12, 1987); CR VOL. I.DD; EXH. 187, CR 16961-52.

4. *Evidence That A Viewing Standard Would Be Unworkable, Unfair, Expensive And Administratively Burdensome.*

786. The record included the following information:

> "The FCC's 'Compromise' must-carry rule incorporated a provision requiring stations to demonstrate a 2% share of viewing in no-cable homes in order to be qualified for carriage. Any similar provision included in must-carry and channel position legislation must anticipate the increased fractionalization and decreased audience shares likely to be found in the video marketplace of the future.
>
> As cable penetration continues to grow, finding a representative sample of non-cable homes in which to conduct ratings surveys will become increasingly problematical and costly. For this reason, any audience requirements should be pegged to all homes and not just non-cable homes.
>
> In the video marketplace of the future, most consumers will have access to 50 or more channels. Moreover, all of those channels are likely to become core competitive. In a 50 channel environment of competitively equal channels, a 2% share would reflect an *average* audience size, not a substandard audience size. For this reason, the 2% share requirement in the compromise rules shoul dnot be included in new legislation."

Source: "Hearings on Must Carry" at 87 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04097.

787. The record indicated that: "The diary has come under increasing criticism in recent years as audiences have been offered more and more channels and have, by most accounts, failed to accurately record much of the viewing, particularly of cable channels and independent stations. The problem is exacerbated by the custom in

many homes of one family member (usually the mother filling out the diary for all. In the 1950's and 1960's the diary was acceptable, industry executives say, because there were only three main sources of viewing, ABC, CBS and NBC. But now, with many more viewing sources, the consensus is that the diary is an obsolete tool for measuring demographics. To make matters worse, the usable diary sample (known as the in-tab sample) has been shrinking in recent years as viewing choices have increased." Source: Petition for Partial Reconsideration of Spanish International Communications Corporation and SIN, Inc. in MM Docket No. 85-349 (Jan. 12, 1987); CR VOL. I.DD, EXH. 186, CR 16943.

788. NCTA also took the following position on the record:

> "NAB shows that, in some cases, the ratings of independent television stations exceed the ratings of even the most popular cable networks. Even where this is the case, it does not necessarily follow that '[r]eplacement of local over-the-air television stations on cable systems with new cable program services, therefore, is not a response to consumer demand since more viewers watch the over-the-air stations.' NAB wrongly relies upon viewership shares as the sole measure of consumer demand. Because they are able to sell their programming directly to consumers rather than only to advertisers, cable operators can identify and response to true consumer demand—including the intensity of demand—by providing the programming that is most highly *valued* by consumers. Ratings are the ultimate measure of whether a program meets *advertiser* demand; they cannot fully measure the extent to which a program meets *consumer* demand."

Source: Reply Comments of the NCTA, Inc. in MM Dock. No. 90-4 at 20 (Oct. 25, 1991); CR. VOL. I.Q, EXH. 78, CR 11314.

789. The record included the following information: "Rubens and other network research executives, including CBS's David Poltract, cite lower levels of cooperation with Nielsen when it comes to having people meters installed, compared to Audiometers. And a higher attrition rate within the people meter sample base. The result, they suggest, is a people meter base that less accurately reflects the viewing universe than the NTI audiometer base. The 'bias' appears to be in favor of households with higher income and education levels, larger families and people who are generally more receptive to such 'high tech' items as personal computers and VCR's. Rubens said that according to some people meter testing, teenagers and children represent the biggest accuracy problem. 'No one has devised a meter that will get children, 2-5, to push the buttons accurately,' he said." Source: Petition for Partial Reconsideration of Spanish International Communications Corporation and SIN, Inc. in MM Docket No. 85-349 at 60 (Jan. 12, 1987) (Attachment I); CR VOL. I.DD, EXH. 186, CR 16943.

790. The record also included the following: "For ease of administration, stations should not be required to meet a viewing standard to become qualified. A viewing standard requires broadcast stations to undertake often costly viewer surveys. In markets with high cable penetration, it is difficult to obtain useful survey data from non-cable households which are hard to pinpoint and whose viewing habits may be unrepresentative. Further, a viewing standard creates difficulties for new stations. Stations that have begun operations since the demise of the must carry rules have not had an opoprtunity in many markets to establish an audience for their programming, a point recognized by the Commission in its post-*Quincy* signal carriage rules. *See* 47 C.F.R. § 76.5(d) (1988). Foreign language stations also may have difficulty obtaining accurate counts of their viewers." Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket

No. 90-4 at 30-31 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10344-45.

791. The record indicated that: "Arbitron warns users that its methodology 'may preclude full participation of certain groups within the population such as . . . households whose primary language is other than English.' *Arbitron Television Market Report (Houston)* (November 1990) at iv." Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 31 n.34 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10345.

792. The following information was in the record: "Overcoming these problems with a viewing standard would result in a complex standard difficult for cable systems and broadcasters to apply in concrete situations. That would increase the cost of administering signal carriage rules and would add to the burden on the Commission which would be forced to resolve the inevitable disputes about whether a particular station qualified for an exception. If adequate channel capacity is reserved for broadcast signals, therefore, the Commission should not set a viewing standard as a condition for a station being qualified for inclusion in the signal carriage pool." Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 31 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10345.

793. The record indicated: "Surveys required to establish 'significantly viewed' status can range from 9,000 to 15,000 dollars per community, depending upon cable penetration." Source: Comments of the National Association of Broadcasters on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 30 n.32 (Feb. 14, 1991); CR VOL. I.O, EXH. 45, CR 10344.

794. The record included the following information:

> "Cable systems enjoy a favored status over independent broadcasters in that under current law such sta-

tions are not currently given exclusive rights against cable networks for their programming in their own markets. Cable systems may bring in distant, out-of-market independent and network affiliated signals or even many national non-broadcast cable networks which carry some or even many national non-broadcast cable networks which carry some of the very same programming provided by the local station. This obviously handicaps the local independent station in obtaining ratings, since the multiplicity of cable signals reproducing its syndicated programs fragments the audience. Indeed, such fragmentation can cut significantly into independent broadcasters' share of the audience by providing much of the same programming imported from other sources. This further undercuts any possible rationale for a ratings test for cable signal carriage."

Source: NITC's Petition for Reconsideration in MM Dock. No. 85-349, at 5 (Jan. 12, 1987); CR. VOL. I.DD, EXH. 187, CR 16952.

795. The record included the following information: "In March 1966, Arbitron measured the audience of San Antonio Licensee KWEX-TV, in two separate studies, conducted simultaneously. One study commissioned on behalf of the station was a telephone survey, which reported that the station reached an average of 23,400 households in prime time, Monday-Friday. This was *ten times* the audience reported by Arbitron's regular syndicated study, which used the diary methodology."

Source: Reply Comments of Spainsh International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills Television Company in MM Docket No. 85-349 at 14-15 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR 16308-09.

796. The record included the following:

"The problems encountered by the diary method in English-language television become absolutely overwhelming when one examines the unique requirements of the Spanish market. To build a sample of diary-keepers, the ratings services place telephone calls to a universe of telephone homes and request the respondent to participate in a television survey. Since the call is initiated in English, Licensees believe that Hispanic respondents are encouraged to 'Think English.' If the respondent does not speak English and the interviewer does not speak Spanish, theoretically, a follow-up call is made by a Spanish-speaking interviewer. Many Hispanics feel that such call-backs in Spanish are demeaning. Clearly, this does not inspire a desire to cooperate and, as later discussed significantly lowers the response rate for Spanish-speaking viewers.

Another complication in measuring the Spanish market is that maintaining a diary, according to Arbitron, requires a high school education. This requirements eliminates less educated viewers generally, and particularly handicaps research of Hispanic viewing since only 47% of Hispanic adults 16 or older meet the 'high school or better' requirement for filling out a diary, compared to 70 percent for the total United States population."

Source: Reply Comments of Spanish International Communications Crporation, Bahia De San Francisco Television Company and the Seven Hills Television Company in MM Docket No. 85-349, at 10 (March 21, 1986) (citing Spanish USA-1984: A Study of the Hispanic Market, Yankelovich, Skelly & White, Inc. at 7); CR VOL. I.CC, EXH. 168, CR 16304.

797. The record included information that ratings data "consistently and significantly understate[s] discrete viewing audiences. Their mission is to measure mass, homogenized audiences which justify the major networks' adver-

tising rates. The rating services fail miserably to measure minority, foreign language, educational, and other 'non-dominant' viewing audiences." Source: Reply Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills Television Company in MM Docket No. 85-349 at 10 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR 16299.

798. The following information was in the record: "Furthermore, it is acknowledged by Arbitron that Hispanics do not return diaries in the same proportion as respondents in the general market. Consequently, both Arbitron and Nielsen have implemented special 'ethnic controls' such as increased monetary compensation and reminder telephone calls to encourage the response rate. Despite these efforts, the Hispanic return rate is widely believed to be only half the return rate of the general market." Source: Reply Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills Television Company in MM Docket No. 85-349 at 11 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR 16305.

799. The following information was in the record:

> "Licensees are convinced by independent research and their own extensive experience with the recognized ratings services that the diary, and with the possible exception of two bilingual markets, meter methodologies used for English-language television are ineffectual in the case of Spanish-language television. While the industry has acknowledged that the diary methodology is imperfect, it was believed to be practical and extremely affordable and, consequently, has long been a staple of Arbitron and Nielsen. However, diary reliability has more recently become the subject of considerable concern. The significant increase in viewing choices over the past 25 years provided by cable, satelilte and low power television have rendered the diary an impractical and cumbersome way to record viewing. Even the most conscientious diary-keeper would suffer diary fatigue in an effort to chronicle accurately his viewing of the myriad channels of programming available to him."

Source: Reply Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills Television Company i MM Docket No. 85-349 at 8-9 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR 16302-03.

800. The following information was in the record: "Finally, and most importantly, the diary methodology inaccurately measures Hispanic viewing because the sample frame from which diary homes are selected consists entirely of telephone homes, listed and unlisted. Attempts to place diaries in non-phone homes were abandoned recently by Arbitron. Nielsen never made the effort. Arbitrarily omitting non-phone homes means that 33 percent of all Hispanic homes are not represented in diary research. The absence of a telephone in these homes is not always due to economics. A study by Yankelovich, Skelly & White determined that two-thirds of Hispanic residents 16 and older were born outside of them United States. Coming from countries where a telephone is not an essential part of their culture, it is not always a priority for them in the United States." Source: Reply Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills Television Company in MM Docket No. 85-349 at 11 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR 16305.

801. The following information was in the record: "In February 1975, Arbitron measured New York Spanish-language audiences in two separate studies. One study, commissioned on behalf of licensee WXTV, utilized telephone surveys in conjunction with diaries. Thus study

concluded that WXTV reached an average of 72000 homes in prime time. This was roughly *triple* the audience reported by Arbitron's simultaneous syndicated study, using diaries." Source: Reply Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills Television Company in MM Docket No. 85-349 at 15 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR 16309.

802. The following information was in the record: "Meanwhile, Arbitron and Nielsen continue to publish data which drastically undermeasure Licensees' audience. For example, in fall of 1985, Arbitron reported that Los Angeles Licensee KMEX-TV reached only 145,000 homes during prime time, Monday-Friday. Yet, the figures for the SRC study for the same period reveal that KMEX reached 313,000 homes, 100 percent more than the number reached by Arbitron. Similarly, during the same period Arbitron reported that New York Licensee WXTV reached only 61,000 homes; however, SRC found that WXTV in fact reached 187,000 homes, 200 percent more homes than reported by Arbitron." Source: Reply Comments of Spanish International Communications Corporation, Bahia De San Francisco Television Company and the Seven Hills 16310.

Television Company in MM Docket No. 85-349 at 16 (March 21, 1986); CR VOL. I.CC, EXH. 168, CR

803. The following information was also in the record:

> The diary has come under increasing criticism in recent years as audiences have been offered more and more channels and have, by most accounts, failed to accurately record much of the viewing, particularly of cable channels and independent stations. The problem is exacerbated by the custom in many homes of one family member (usually the mother) filling out the diary for all. In the 1950's and 1960's the diary was acceptable, industry executives say, because there were only three main sources of viewing, ABC, CBS and NBC. But now, with many more viewing sources, the consensus is that the diary is an obsolete tool for measuring demographics. To make matters worse, the usable diary sample (known as the in-tab sample) has been shrinking in recent years as viewing choices have increased.

Broadcasting, "1987 Ushers in the People Meter Era," Jan. 5, 1987 at 60, appealed to Petition for Partial Reconsideration of Spanish International Communications Corp. and SIN, Inc. in MM Dock. No. 85-349; CR VOL. I.D.D, EXH. 186, CR 16943.

804. The record included the following information:

> "[F]or years cable networks have complained about the inadequacies of Nielsen's national diary sample. The sample, most agree, is too small to accurately measure cable's smaller audiences, and consistently underreports cable viewing. 'The diary has long been obsolete" for measuring viewing levels, says Marshall Cohen, senior vice president, research and corporate services, MTV Networks Inc. "It has been underestimated our viewership by huge amounts.' Cohen said MTVN, which operates MTV, Nickelodeon, Nick-at-Nite and VH-1, has ordered costly telephone coincidental surveys that indicate that Nielsen's diary system has been underreporting viewership for its network by 25% or more. Those surveys were taken by Nielsen."

Broadcasting, "1987 Ushers in the People Meter Era," Jan. 5, 1987 at 62, appended to Petition for Partial Reconsideration of Spanish International Communications Corp. and SIN, Inc. in MM Dock. No. 85-349; CR VOL. I.D.D. EXH. 186, CR 16945.

805. The record also included information that "USA's research vice president, David Bender, said diaries 'consistently underreport' viewing for cable.' " *Broadcasting*, "1987 Ushers in the People Meter Era," Jan. 5, 1987 at

62, appended to Petition for Partial Reconsideration of Spanish International Communications Corp. and SIN, Inc. in MM Dock. No. 85-349; CR VOL. I.D.D, EXH. 186, CR 16945.

806. The record included the following:

> "The question then becomes: Which company should provide the service? In most markets the trend is that some stations seem to do consistently better in Arbitron while others do better in Nielsen, probably due to biases in the samples that are too small to correct. Getting a consensus favoring one over the other is improbable at best.
>
> There may be alternatives on the horizon. R.D. Percy & Co., baased in Seattle, plans to launch a local people meter service in New York this year. The company claims it will passively verify that people are pushing all the right buttons and that viewing of commercials, not programs, will be measured.
>
> That could be the biggest breakthrough because the bottom line is that advertisers want to know who is watching their commercials. For almost 40 years advertisers have had to settle for knowing who's been watching the programming inserted between product pitches."

Broadcasting, "1987 Ushers in the People Meter Era," Jan. 5, 1987 at 63, appended to Petition for Partial Reconsideration of Spanish International Communications Corp. and SIN, Inc. in MM Dock. No. 85-349; CR VOL. I.D.D, EXH. 186, CR 16946.

807. The following information was in the record: "The diary system is now considered outsdated for, among other reasons, its inability to provide accurate viewing data for cable television and independent stations." *Wall Street Journal*, Jan. 7, 1987, appended to Petition for Partial Reconsideration of Spanish International Communications Corp. and SIN, Inc. in MM Dock. No. 85-349; CR VOL. I.D.D, EXH. 186, CR 16947.

808. The record also indicated the following disagreement about the appropriate tool for audience measurement:

> "Regardles of which route Nielsen takes, advertisers and the networks are preparing to slug it out. Some network executives say that if advertisers insist on pure people-meter data, they might lower or even do away with, audience guarantees.
>
> Advertisers retort that the advertising outlook is oto weak for the networks to fool around with guarantees. 'I don't think this is the marketplace for them to pull something like that,' says Alec Gerster, executive vice president for Grey Advertising. 'That would be a mistake.'
>
> Adds Mr. Ostrow of Young & Rubicam: 'Obviously we'll have to recognize what the networks intend to use. But if it isn't in keeping with what we think is appropriate, we may have to use two sets of numbers—theirs and ours.' "

Wall Street Journal, Jan. 7, 1987, appended to Petition for Partial Reconsideration of Spanish International Communications Corp. and SIN, Inc. in MM Dock. No. 85-349; CR VOL. I.D.D, EXH. 186, CR 16947.

E. Evidence That A Simple "Off Air" Channel Requirement Would Be Inappropriate.

1. *Evidence That Permitting Cable Companies To Resopitio nBroadcast Stations To "Off Air" Channel Positions Would Injure Broadcasters Who Had Historically Received And Relied Upon Lower Channel Positions On Cable Systems. Although The Cable Industry Contended That Broadcast Stations Sohuld Be Positioned On Cable Systems On The Same Channel Number On Which They Broadcast Over The Air, The Record Indicated That This Would Be Problematic In The Following Respects:*

809. The record indicated: "Some of the most disturbing examples of this channel repositioning problem have involved Chris-Craft's station KBHK in San Francisco. As early as the 1970s, KBHK recognized that local broadcasters and cable companies shared a symbiotic relationship in a highly cabled market. In the early days of cable, KBHK was carried on a wide array of cable channels throughout the Bay Area. It determined to try to reach an agreement with cable companies to move KBHK to one unified, market-wide cable channel. KBHK opted for channel 12, at a time when many cable systems had only twelve channels, even though a number of them had previously carried the station on lower channels. The station then hired a full-time employee to work with cable operators. It promoted the benefits of cable subscribership on billboards and elsewhere, and it paid the expenses that cable systems incurred in moving KBHK to channel 12. Although there were more than 65 Bay Area communities then served by over 40 cable companies, KBHK ultimately achieved unification on cable channel 12 with almost 90% of all Bay Area subscribers. It launched a massive promotional campaign to identify

itself as 'Bay Area Cable 12.' This name became so identified with KBHK through on-air and print media promotions that it has now become a registered trade name. By the time of the *Quincy* decision in 1985, KBHK had clearly distinguished itself as the number one rated UHF station in San Francisco." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 12-13 (March 1, 1990); CR VOL. I.S, EXH. 99, CR 11972-73.

810. The record indicated that: "KBHK spent millions to achieve and promote its position as 'cable channel 12' for some 87% of the San Francisco ADI's cable subscribers. The value of that position to us has been substantial. A Nielsen study commissioned by INTV, described in the attachment to this response, indicates that in February, 1987, KBHK's weekly cumulative audiences were 6% lower on cable systems where we had been channel shifted in late 1986 than on other systems where we retained our established channel position." Source: Response of John C. Siegel, KBHK to FCC Questions in MM No. 89-600 at 3 (rec'd April 17, 1990); CR VOL. I.S, EXH. 124, CR 14536.

811. The following information was in the record: "The final issue is that many years ago cable took some of the established stations and, for their own reasons, might have taken a UHF station and put it on channel 6 and it might have stayed there for years. The broadcaster would go out and promote the fact that on channel 22 over the-air, but cable channel 6. [Sic] Then cable comes along with a financial interest in these program services. They sell advertising on them. Oftentimes they own a piece of them. They say channel 6 is a nice position, I think I want that, and so off goes the local broadcaster who may have lived there and made that his business address for 20 years. He is gone, poof, not because it is in the consumer's best interest, but it is in the cable operator's best interest bottom line-wise." Source: "Hear-

ings on Cable TV Consumer Protection Act of 1989" at 237-38 (Testimony of James Hedlund); CR VOL. I.H, EXH. 15, CR 05807-08.

812. The record included the following: "Cable operators also effect public television's audiences by shifting stations from one channel position to another, often without notifying the public station of the shift. Where a station has dedicated a great deal of time and effort to building station identification on a particular cable channel, any move can be devastating, even if the shift is to the (usually higher) over-the-air channel number." Source: "Hearings on Must Carry" at 102 (Statement on David Brugger); CR VOL. I.F, EXH. 12, CR 04112.

2. *Evidence That Shifting Broadcast Stations To "Off Air" Channel Positions Would Preclude Them From Being Received In Many Cable Households.*

813. The following information was in the record before Congress: "[C]able operators have built distribution plants in which not all of the channels are equal. The first twelve channels (2-13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are not viewable on cable-connected sets that are not 'cable ready'. Based on data from the '1989 Television Fact Book,' approximately 42 percent of television sets in homes today are not 'cable ready.'" Source: "1991 Senate Report" at 44; CR VOL. I.A, EXH. 3, CR 00304.

814. The record indicated that: "Non-'Cable ready' sets that are connected to a cable without a converter box receive via cable only those stations that program services carried on channels 2-13. Being shifted 'up' is the equivalent of being removed from the system with respect to these television sets.'" Source: "Hearings on Cable Television Regulation" at 877 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07881.

815. The record also indicated: "On occasion, cable companies 'offer' to move local broadcasters to cable channel position which match the broadcasters' over-the-air designations. For some stations this may be acceptable, but for others a move of this nature is tantamount to bring dropped from the system entirely. For example, some cable companies like TCI do not automatically give subscribers with second sets a converter box when they hook up that second T.V. set. If the second set is not cable-ready, and virtually all are not, and if the station was moved out of the 2-13 channel range, it is very unlikely that that station can be received on that second set." Source: "Hearings on Competitive Issues" at 698-99 (Statement of John Siegel); CR VOL. I.C, EXH. 8, CR 02037-38.

816. The following information was in the record: "Estimates of the universe of no-'cable ready' sets are difficult to calculate. Nevertheless, based on data from the *1989 Television Fact Book*, approximately 42% of existing television sets in homes today are not 'cable ready.'" Source: "Hearings on Cable Television Regulation" at 877 n.38 (Statement of James B. Hedlund); CR VOL. I.J, EXH. 18, CR 07881.

817. The record indicated that: ". . . it is important to understand that not all of the channels on these cable systems are equal. The cable industry has built a distribution plant in which only the first 12 channels get through to all the sets hooked to the cable, and some studies that have been conducted for the cable industry show that there is as much as 30 percent more viewing to the first 12 channels than to the higher channels." Source: "Hearings on Must Carry" at 58 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04068.

818. The record included the following: "Cable practices also have impaired the Stauffer stations' ability to compete effectively with other television stations carried by the cable systems. In general, the frequent channel

position changes imposed on the stations have placed several of the stations at a disadvantage to their competitors. Often, a cable system will place a station at a cable channel position which is higher on the cable system than the station's over-the-air position or the cable channel positions of its competitors. If is Stauffer's experience that its stations lose viewership when this occurs because viewers generally identify a station by its over-the-air channel (as opposed to its cable channel position) and tend to tune into those stations which have lower cable channel positions. Complete removal from a cable system is clearly detrimental to a station's ability to compete effectively in its broadcast service area. In effect, a dropped station cannot compete at all unless it is sufficiently carried by another cable system or the initial carrier decides to place it back on its system." Source:

Comments of Carl J. Occhipinti, General Manager, KBWN-TV, Cheyenne, Wyoming in MM Docket No. 90-4 at 3 (Sept. 25, 1991); CR VOL. I.P, EXH. 69, CR 10919.

819. The record indicated that: "Over 41% of all color television sets factory sold from 1981 to 1987 were not cable compatible. *See* 1989 Television & Cable Factbook Cable & Services Volume at C-322. This figure does not include black and white sets, and it does not include sets sold in earlier years, many of which can be expected still to be in use—particularly as second or third sets in the household. As noted above, even 'cable ready' sets may be unable to receive higher cable channels without the use of converter boxes." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 17 n.32 (March 1, 1990); CR VOL. I.S, EXH. 99, CR 11977.

820. The record also indicated that: "Existing stations, already carried on cable systems, have been rooted out of traditional, long-time, VHF channel positions and

relocated to UHF channel positions in 'cable Siberia.' *Because cable operators do not provide converter boxes to every set connected to their wire, many television sets can only receive Channels 2 through 13 via cable.* Thus, stations that are shifted into the UHF band are not viewable via cable on many cable connected television sets across the country. In a very real sense, a move up—is a move out." Source: Comments of the Association of Independent Television Stations, Inc. in M.M. Docket No. 90.4 at 3 (Sept. 25, 1991) ("Free Television Under Siege," INTV (May 1988); CR VOL. I.K, EXH. 21, CR 08547.

821. The following information was in the record: "Local stations shifted to a channel position higher than 13 cannot be received *at all* on many television receivers. Non-'cable ready' sets that ar econnected to a cable without a converter box receive via cable only those stations and program services carried on channels 2-13. These conditions frequently exist in apartment buildings, hotels and on second and third sets in private homes (recreation rooms, bedrooms, etc.). Being shifted up is the equivalent of being removed from the system with respect to these television sets." Source: "Hearings on Competitive Problems" at 352 n.3 (Statement of Preston Padden); CR VOL. I.H, EXH. 14, CR 05285.

822. The record included the following information:

> "Columbia Cable, in a surprise announcement [on December 28, 1989] notified all local stations that they would be moved January 2, a very short, two working days' notice. . . . [O]n Tuesday, January 2, at 1 a.m., the channels were changed as follows:
>
> KEPR CBS from Cable Channel 17 to 19
> KNDU NBC from Cable Channel 11 to 25
> KVEW ABC from Cable Channel 12 to 42
> KNTW PBS from Cable Channel 10 to 31

Since this is an all-UHF television market, Columbia Cable argued that no harm would be done in moving all local TV stations to their corresponding numbers on the over-the-air dial. In actual practice, however, this turned into a big problem.

A significant number of cable viewers, some estimate as many as 10% to 20%, have older TV sets that ca nreceive only Channels 2 through 13. These viewers are most likely low income, the elderly on fixed incomes. Also, there is a problem with many of the local motels where TV sets in their rooms can only reach Channels 2 through 13. Nursing homes in the Tri-Cities are also affected."

Source: Comments of the 97 Television Stations in MM Docket No. 89-600 at 1 (March 1, 1990) (Affidavit of Dale Hazen); CR VOL. I.S, EXH. 100, CR 12012.

823. The record before Congress also included the following testimony:

"[T]he problem with on-channel carriage comes in a number of respects. One is that the average cable system today has about 32 channels. There are more than half of the UHF stations, most of whom are my members, with channel numbers higher than 32 and so it is a physical impossibility to carry them on-channel to start with. Secondly it is very common in the cable industry now that your friendly cable operator comes in the door and they hook up your cable to say the set in your family room—that is the fancy one—and they have a converter on it, and that converter allows you to access all of the channels on basic service. And then they will say since we are here and we want to be consumer-friendly, we will, free of charge, hook up all the other television sets in your house with cable. Now, if you want a converter on it, you understand it is going to cost

you another eight or nine dollars a month but, we can hook the cable directly to the back of your T.V. set, and then you will receive all of the cable services we provide on channel 2 through 13. A lot of people take that option because cable is already expensive. It is spending four, five or six bucks for every additional set in the household can be expensive where that happens. [Sic] Our signals, even if they are sent down the line on, say, channel 18, do not come out the other end. We depend on children for a lot of our viewing. Almost every independent station programs to children on weekday afternoons. Most or a great deal of the viewing by young kids does not take place on the primary set. So when these kids get home from school, they may go down to the rec room or their bedroom or wherever the set is that used to be in the living room, and you put downstairs for kids, and that has 12 channels of cable on it, which does not sometimes include the local stations. And if they are not there, the kids just watch something else."

Source: "Hearings on Cable TV Consumer Protection Act of 1989" at 237 (Testimony of James Hedlund); CR VOL. I.H, EXH. 15, CR 05807.

824. The record included the following information:

"More than four in five cable customers in Millbrae (83%; see Table for these datao) have one or more television sets in their homes for which they have *no* converter box. Furthermore, for nearly three-quarters (72%) of these customers, at least one of their television sets is connected to cable without benefit of a converter box. This means that 60% of these cable customers are attempting to watch cable television programming on at least one of their television sets (their second set) without benefit of a converter box.

When the customers who were attempting to watch cable television on sets without a converter box were asked to turn on their television sets which were connected to cable, and set them to channel 22, one in five (20%; see Table 1) reported that they could not receive KBHK on their television set, half (10% overall) got no programming whatsoever while the other half (10%) received the programming from some other broadcast channel."

Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 89-600 at 2-3 (March 1, 1990) (Declaration of Dr. G. Anthony Siesfield); CR VOL. I.H, EXH. 99, CR 11987-88.

3. *Evidence That For Many Broadcast Stations, "Off-Air" Channel Placement Even On Cable-Ready Television Sets Was Not Technically possible.*

825. The record indicated that: ". . . 'on channel' carriage is simply *not possible* for approximately half of all UHF stations. The channel capacity of the average cable system is 31 channels. However, approximately half of the UHF stations have FCC assigned over-the-air channel numbers higher than 31. Thus, they cannot be placed 'on channel' on cable systems." Source: "Hearings on Must Carry" at 82 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04092.

826. The following information was in the record: "As the Commission well knows, cable systems do not transmit channels above channel 13 on true UHF channels. They are transmitted on channels contiguous to the VHF channels. Television receivers which are not cable-compatible cannot receive signals transmitted on such frequencies. Furthermore, cable-compatible sets vary as to their capabilities. Some may be capable of receiving 108 cable channels, whereas others may be limited to 36

channels. If a UHF station is repositioned from channel 10 to channel 47, it then would not be accessible on a cable-compatible set capable of receiving only 36 channels. On some systems even cable compatible sets still are incompatible with the system's technology. According to data in the *Television & Cable Factbook* (1989), 58.8% of the color television receivers sold between 1981 and 1987 were cable-compatible. Consequently, at least 40% of the sets sold were not cable compatible." Source: Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 89-600 at 55 n.87 (March 1, 1990); CR VOL. I.U, EXH. 107, CR 12621.

4. *Evidence That An "Off Air" Channel Requirement Would Actually Cause Channel Repositioning.*

827. The record included the following:

"But, the greatest flaw in the 'on-channel' proposal is that it would cause more shifting than it would cure. Most UHF stations are presently carried in the first 12 channel positions on many cable systems. For example, WHNS operates on over-the-air channel 21 in Greenville, South Carolina. However, it is carried on the first twelve cable positions (mostly on channel 12) on 87% of the local cable systems. Plainly it would be a gross disservice to this local South Carolina Independent station to adopt legislation authorizing, or directing, cable operators to shift it to less desirable high number channel positions.

Similarly, station KPTM operating on over-the-air channel 42 in Omaha, Nebraska, is carried in the first 12 slots on 86% of its cable systems. KPDX, over-the-air channel 49 in Portland, Oregon is carried on channels 2-13 on 82$ of local cable systems. WLVI, over-the-air channel 56 in Boston is carried in the first 12 channels on 52% of its cable systems.

KHTV, over-the-air channel 39, is carried on channels 2-13 on 80% of the systems in the Houston ADI. And WDRB, over-the-air channel 41 in Louisville, Kentucky, is carried on channels 2-13 on 100% of the Kentucky cable systems that carry the station.

There is no doubt that cable operators want to relocate local UHF Independent stations to high numbered 'on channel' positions in order to enhance the salability of the cable operator's own advertising availabilities."

Source: "Hearings on Must Carry" at 82-83 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04092-93.

828. The record also included:

"Now, you heard Mr. Mooney suggest that putting stations on channel is the way to solve this, and I will be the first one to admit to you that there is a certain superficial appeal to that approach. But I would like to show you, with Jim's help here, what the problem is with that, and these are representative and I will readily admit to you I tried to pick examples from the home states of members of the Subcommittee and the Committee itself.

Channel 21, WHNS, in Greenville, South Carolina, is currently carried in the VHF band on the first 12 channels on 87 percent of the cable systems. Now, if we pass a bill that says you have to carry—the cable guy has to carry stations on their FCC-given channel number, it will not stop channel shifting. It would cause this station to be shifted on 87 percent of the cable systems that are currently carrying it, and so I do not see how on-channel carriage can be a solution to channel shifting. I think it would precipitate more channel shifting.

KPTM, Channel 42 in Omaha, Nebraska, carried in the VHF band on 86 percent of the cable systems—and I would point out that since the average capacity of cable systems is 31 channels, Channel 42 cannot even—it is not technically possible to put Channel 42 on channel, on the FCC-given channel number, because the cable operator does not have a channel 42 to offer him and so it is not technically possible.

KPDX, Channel 49 in Portland, Oregon, carried in the VHF band on 82 percent of the cable systems: again, it would not be possible to put KPDX on Channel 49 because the cable operator does not have a Channel 49.

WLVI in Boston, Channel 56: Very strong station up there with a prime time newscast carried in the VHF band on 52 percent of its cable systems.

Finally, WDRB, Channel 41, in Louisville, Kentucky, carried in the VHF band on 100 percent of the Kentucky cable systems that carry that station. If we pass a law that says the cable guy has to carry the station on its FCC-given channel number, it will cause WDRB to be shifted on 100 percent of the cable systems that are currently carrying it."

Source: 30-3-82. "Hearings on Must Carry" at 58-59 (Statement of Preston Padden); CR VOL. I.F, EXH. 12, CR 04068-69.

5. *Evidence That "Off Air" Carriage Of Broadcast Stations On Cable Systems Would Significantly Disadvantage Those Stations Repositioned.*

829. *See* Section VII.B.2 *supra*.

830. The record included the following information: "On-channel carriage on cable far from equates with off-the-air on-channel reception.

For example, stations licensed to Washington, D.C., operate on channels 4, 5, 7, 9, 20, 26, 32, and 50. When received directly off-the-air, the viewer tunes from one channel to the other without encountering intervening program services. However, a cable subscriber in Washington, D.C., tuning, for example, from channel 9 to channel 20, will tune through 10 other program services between channel 9 (WUSA-TV) and channel 20 (WDCA-TV). Such 'grazing' from channel to channel between channel 9 and channel 20 places channel 20 at a far more disadvantageous position in its on-channel position on cable than off-the-air. (Random access remote control sets, of course, may be turned directly to any desired channel without 'scanning' up or down across the intervening channels. Many viewers, however, when seeking a program to watch, simply 'graze' across consecutive channels rather than individually selecting particular channels to sample.)."

Source: Reply Comments of INTV in MM Docket No. 89-600 at 3 p.3 (April 2, 1990); ("The 'Myth' of On-Channel Carriage); CR VOL. I.X, EXH. 121, CR 14489.

831. The record indicated that: "The upper reaches of the dial, to which channel-shifted stations are typically repositioned, are the cable equivalent of 'Siberia.' Most subscribers will not make the effort to search for a station that is exiled to 'Siberia' or bear the burden or expense needed to receive it (*e.g.*, by obtaining an adequate converter box). Deprived of equal access, the channel-shifted broadcast station in the long run becomes less and less able to compete for advertising, programming and, ultimately, viewers." Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 9 (Sept. 25, 1991); CR VOL. I.Q, EXH. 74, CR 11238.

X. EVIDENCE THAT BECAUSE THE CABLE INDUSTRY WAS HEALTHY, AND WOULD DRAMATICALLY INCREASE CHANNEL CAPACITY IN THE NEAR FUTURE, MUST CARRY REQUIREMENTS WOULD IMPOSE ONLY LIMITED BURDENS IN THE SHORT TERM, AND VIRTUALLY NO BURDEN IN THE LONG-TERM.

A. Evidence That The Cable Industry Was Both Healthy And Expanding.

832. The Federal Communications Commission had provided the following report to Congress on the state of cable:

"The growth and development that the cable industry has experienced since the Cable Act are readily measurable. First, the cable industry has invested in expanding its plant to the point where it now offers multichannel video service to about 90 percent of Americans; before the Cable Act, cable was available to about 70 percent of American households. Second, the cable industry has significantly expanded its channel capacity—now offering substantially greater viewing choices to the American public. While almost 60 percent of all cable subscribers were served by cable systems with at least 30 channels before the Cable Act, that number has grown to about 90 percent of cable subscribers today. The cable industry has significantly increased its annual investment in new and expanded capacity by 55 percent, from $1.1 billion in 1984 to $1.7 billion in 1989. Third, the cable industry has launched numerous new programming services and original programs. Indeed, the number of cable programming services and original programs. Indeed, the number of cable programming services has doubled since the Cable Act. The cable industry has tripled annual spending on programming from $302 million to $965

million during this same period. Fourth, we note that cable industry revenue has more than doubled from $8.5 billion in 1984 to $17.7 billion in 1989; the portion of cable's revenue derived from advertising time has more than tripled from $594 million to over $2 billion."

Source: FCC Report, "In the Matter of Competition, Rate Regulations and the Commission's Policies Relating to the Provision of Cable Television Services," MM Docket No. 89-600 at 5-6 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 08977-78.

833. The record indicated that: "Cable has long since grown out of infancy. Total cable penetration has now passed 50 percent of all households, and some projecitons have it exceeding 70 percent by the mid-1990's. Cable revenues, now approximately $14 billion, are projected to exceed $35 billion over the next decade. And cable has become enormously profitable, with the price of cable systems increasing in the past three years from $800 per subscriber to more than $2500 per subscriber in some recent transactions, and with the 20 largest cable networks expected to generate more than $500 million in cash flow in 1989." Source: Comments of CBS Inc. in MM Docket No. 89-600 at 9-10 (March 1, 1990); CR VOL. I.W, EXH. 115, CR 13695-96.

834. The record also indicated that: "While broadcast networks still capture more than a 50 percent audience share among cable subscribers, fifteen years ago that number was 98 percent. As cable invests in new, better, and more diverse programming, we expect this trend to continue." Source: "Oversight Hearings" at 7 (Statement of James P. Mooney); CR VOL. I.F, EXH. 11, CR 03464.

835. The following information was in the record: "Cable household penetration, as a percentage of total

[television] households, has steadily climbed throughout this decade:

1980	22.6%
1981	28.3%
1982	35.0%
1983	40.5%
1984	43.7%
1985	46.2%
1986	48.1%
1987	50.5%
1988	53.8%
1989	55.6%

Inc. on Second Further Notice of Proposed Rulemaking in MM Docket No. 90-4 at 6 (Sept. 25, 1991) (citing "OPP Report," June, 1991, p. 73, Table 16); CR VOL. I.Q, EXH. 75, CR 11256.

836. The record included the following: "As of July, 1991, 64% of U.S. television households subscribed to cable. Thus almost two-thirds of the nation's homes receive the signals of the stations licensed to local communities over cable system facilities. By the end of this decade, cable penetration could climb to over 70%." Source: Comments of National Broadcasting Company,

837. The record included the following: "I think if you take the long view . . . as to the amount of programming that is migrating from broadcast to cable, and updated to pay per view, you see what the goal of cable is. And if you look at the projections that say that 75 percent of Americans will be subscribing to cable in the year 2000, some 8½ years from now, then you are looking at American being cable dependent, if you will, in large measure." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 259 (Statement of Edward O. Fritts); CR VOL. I.I, EXH. 17, CR 06719. Source: Reply Comments of the National Association of Broadcasters, Appendices, in MM Docket No. 89-600 at

1 (April 2, 1990) (Appendix A); CR VOL. I.X, EXH. 119, CR 14119.

838. The record indicated: "Similarly, cable television, which reached barely 20% of American television homes in 1980, served more than 60 percent of all U.S. households in 1990. The number of satellite-delivered cable programming networks grew by 160 percent, from 27 in 1980 to 70 in 1990. Dozens of regional cable networks were also launched during the 1980s." Source: "Hearings on Cable Television Regulation," at 584 (Testimony of Decker Anstrom); CR VOL. I.J, EXH. 18, CR 07589.

839. The record included the following: "Over 60 percent of American TV households now subscribe to cable. Fully 93 percent of all U.S. homes are now passed by cable. Cable is becoming the only gateway to reach a susbtantial majority of the American video audience, and its ability to control the marketplace to its own advantage grows stronger every day. Cable is also expanding rapidly into the advertising marketplace. In 1987, cable sold $963 million in advertising. This year, it is estimated cable will sell between $2 and $3 billion in advertising—more than double the amount just four years ago, and the Cabe Advertising Bureau estimates tat by the end of the decade cable ad revenues will soar to between $9 and $10 billion." Source: "Hearings on Cable Television Regulation," at 755 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07759.

840. *See also* Sources cited Section V.A.2 *supra,* discussing the projected growth in cable advertising revenues.

841. *See also* Sources cited in Section V.C.5 *supra,* discussing the growth of cable programming networks.

842. *See also* Sources cited in Section II.D *supra,* discussing cable's rate increases during the 1980's.

843. *See also* Sources cited in Section VII.A.1 (discussing the growing competitive strength of cable and projecting its continued growth in the future).

B. Evidence That Cable Operator Claims Of Channel Capacity Constraints Were Overstated And Not Credible.

844. The record included the following report from a study of the industry by a cable trade publication:

> "Other MSOs appear to feel much the same at least in the eyes of the programmers. Says one, 'As programmers, we aren't hearing the channel capacity excuse as much as we once did. Operators use it as an initial fend-off. But if closer examination convinces them that a programming service may have some value, they drop the channel capacity argument. Some of them, in particular Continental, Sammons and Maclean Hunter, may then demand a lot of research. But if you're fortunate enough to reach this point, then you'll start hearing the financial arguments.'
>
> That assessment doesn't vary much from one programmer to another. 'Often, the channel capacity excuse seems to be short-hand for telling the programmer to get lost,' says Barbara Bellafiore Sanden, executive VP of sales and marketing for the fledgling Monitor Channel. 'But if you don't get lost and make your case to the operator, his real message is that he wants to be cautious and deliberate. One operator I recently talked with began with zero open channels. By the time he became convinced of the quality of our product, he had found two channels where he could at least get partial carriage.' "

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 27 (Oct. 25, 1991) (Exhibit G: Cablevision, "To Fill

or Not to Fill," (February 11, 1991)); CR VOL. I.Q, EXH. 81, CR 11458.

845. The record indicated: "For at least a year now, new and developing program services have been frustrated by the channel capacity game. Repeatedly, operators have offered the excuse of a full menu as the reason that new services have had to fight to break into cable. To some extent, the channel capacity argument is valid. But skeptics point to the fact that Turner Broadcasting's TNT never faced this problem when it launched to 17 million subscribers just over two years ago, when overall channel capacity was lower than it currently is in the wake of new rebuilds and upgrades. In fact, recent CableVision research indicates that many larger systems have channels open. And interviews with a broad range of cable operators reveal a variety of other reasons, including corporate control and cost pressures, for the 'scarcity' of channels available." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 24 (Oct. 25, 1991) (Exhibit G: Cablevision, "To Fill or Not to Fill," (February 11, 1991)); CR VOL. I.Q, EXH. 81, CR 11456.

846. The record included the following information from *CableVision* magazine: "looked at 105 large cable systems and found that over 12 percent of their cable channels were not activated. For example, in Pittsburgh, many TCI systems have been rebuilt with 60-channel capacity. Yet TCI only allows its Pittsburgh systems to activate 36 channels." Source: "Hearings on Cable Television Regulation" at 767 (Statement of Edward O. Fritts); CR VOL. I.J, EXH. 18, CR 07771.

847. The record indicated that: " 'The rationale is sometimes technical, sometimes political, sometimes philosophical. But our survey demonstrates that the principal roadblock against adding new services is economic. In other words, after cutting away all the do-good rhetoric, the customer is not king; the system's balance sheet is.' "

Source: "Hearings on Cable Television Regulation" at 767-68 (Statement of Edward O. Fritts) (quoting *CableVision*, "To Fill or Not to Fill," (February 11, 1991)) at 24; CR VOL. I.J, EXH. 18, CR 07771-72.

848. The record also indicated that: "NTIA data also show that the nation's largest multiple system operator (MSO), which controls access to the largest viewing audience, Tele-Communications Inc. (TCI), exercises its market power over programmers by limiting programmers' access to TCI subscribers (*i.e.*, TCI offers fewer programs to its subscribers than smaller cable operators, saving on the cost of programming, increasing profits and leveraging programmers into preferential arrangements for TCI)." Source: "Hearings on Cable Television Regulation (Part I)" at 136-37 (Statement of Gene Kimmelman); CR VOL. I.G, EXH. 13, CR 04334-35.

849. The following information was in the record: "Indeed, many cable operators appear to be constructing additional capacity without providing additional service. In Pittsburgh, for example, many TCI systems have been rebuilt with 60 channel capacity. TCI, however, limits its Pittsburgh systems to activating 36 channels." Source: Reply Comments of the NAB on the Further Notice of Proposed Rule Making in MM Docket No. 90-4 at 3 n.4 (March 1, 1991) (citing "To Fill or Not to Fill," *CableVision*, Feb. 11, 1991, at 24-26)); CR VOL. I.P, EXH. 50, CR 10480.

850. The *Cablevision* research included in the record also indicated the following:

> "The amount of influence wielded at the MSO level becomes obvious, for example, during conversations with several operators in the Pittsburgh, Pa., area, where both Tele-Communications Inc. and Adelphia Communications have large systems. Many channels go unused in some of TCI's suburban Pittsburgh systems because managers are constrained by directive from exceeding the capacity of the least tech-

nologically advanced system. Says one TCI executive who spoke on condition that he not be identified:

'A lot of the suburban systems in the Pittsburgh area have been upgraded or rebuilt to a high capacity. Many of them can accommodate more than 60 channels. But none of them carries more than 36 channels, which is the capacity of some of the systems that haven't been expanded. The company simply doesn't want a public relations problem, with some people complaining about not having programming that others might be getting.'

When pressed, this same executive indicates that the systems constrained by a 36-channel capacity account for 'a relatively small percentage, probably less than 20 percent of the total customer base.' Thus, for apparent public relations purposes, TCI is withholding additional programming from about 80 percent of its customer base in the Pittsburgh suburbs.

Similar situations exist in other cities as well. In suburban St. Louis, where Continental Cablevision has a cluster of systems, about 90 percent of the subscribers have the capacity to get more programming than they are now receiving. But 10 percent of these systems can't handle added channels because they haven't been upgraded from 330 Mhz plant. 'If we can't offer a program service in all communities, we won't offer it anywhere,' says a local Continental official."

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 24-25 (Oct. 25, 1991) (Exhibit G: Cablevision, "To Fill or Not to Fill," (February 11, 1991)); CR VOL. I.Q, EXH. 81, CR 11456-57.

851. The research included in the record also indicated that: "[t]hree out of four [cable] operators (75 percent) do not believe they should fill their systems to

technological capacity." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 24 (Oct. 25, 1991) (Exhibit G: Cablevision, "To Fill or Not to Fill," (February 11, 1991)); CR VOL. I.Q, EXH. 81, CR 11456.

852. The record included the following information: "Cable can expand its capacity; indeed, as has been pointed out, it can employ fiber in trunking or to the curb just as readily as can telco, if not more so (in light of cable's configuration as a tree and branch system). As noted, the Commission should explore some indications that the MSOs are reluctant to expand capacity because with the present limitations, they are in a position to 'squeeze' the proposed cable programmer as to terms of payment—that limited capacity, while it may well deserve the public interest, helps the 'bottom line' of the operator." Source: Comments of Action for Children's Television in MM Docket No. 89-600 at 33-34 (March 1, 1990); CR VOL. I.T, EXH. 106, CR 12524-25.

853. The record indicated that: "This point is driven home by a candid assessment of the 'channel capacity' game currently played by cable operators. Decisions regarding carriage of services are not based on consumer preference or channel capacity. Rather they are based on an MSO's desire to maximize its own balance sheet." Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 26 n.31 (Oct. 25, 1991) (citing *Cablevision*, (Feb. 11, 1991) at 23.); CR VOL. I.Q, EXH. 81, CR 11384.

854. The record also included the following information from the *Cablevision* survey:

"Curiously, none of the operators we surveyed raised the First Amendment as a factor associated with the gatekeeper function. Nor did any of those who described themselves as gatekeepers raise comparisons to being electronic publishers. The only com-

parison raised was to a retail store. Said one: 'We're like retailers. We put the product on our shelves, the customer can select what he wants."

Source: Reply Comments of the Association of Independent Television Stations, Inc. in MM Docket No. 90-4 at 24 (Oct. 25, 1991) (Exhibit G: Cablevision, "To Fill or Not to Fill," (February 11, 1991)); CR VOL. I.Q, EXH. 81, CR 11456.

C. Evidence From The Cable Industry That Its Channel Capacity Would Increase Dramatically In The Near Future.

Historical Increases in Capacity

855. The record included the following historical information regarding the average number of channels per cable system:

1975:	10.7
1980:	13.7
1985:	29.4

Source: National Association of Broadcasters, "Must-Carry Briefing," filed in MM Docket No. 85-349 (July 16, 1986) (chart Comparison of Channel Capacity on Existing Cable Systems") (citing Warren Publishing Co.'s *TV Factbook*, Services Volumes for 1976, 1980 and 1985); CR VOL. I.CC, EXH. 178, CR 16574.

856. The record indicated that: "The average number of active channels increased from 23 on December 31, 1984, to 27 on November 30, 1986, to 32 on December 31, 1989 (Table 6)." Source: FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 ¶ 28 at 23 (July 31, 1990); CR VOL. I.L, EXH. 23, CR 08995.

857. The record also indicated that: "In 1984, 57.4 percent of all cable subscribers were served by systems

with channel capacity exceeding 30 channels; by 1989, 86.8 percent of all cable subscribers were served by systems with such capacity." Source: In the Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television service, MM Docket No. # 89-600, Notice of Inquiry, at ¶ 3 (Released Dec. 29, 1989); CR VOL. I.S, EXH. 91, CR 11727.

Cable Industry Representations About Capital Expenditures and the Anticipated Growth in Cable Channel Capacity

858. The following information was included in the record: "The added channel capacity provided to basic subscribers reflects in part increased investment by our industry in plant upgrades. In 1986, we spent $246 million to improve existing facilities and add channel capacity. In 1987, that figure rose to $292 million and in 1988, it was up to $417 million, a 70 percent increase in just two years. Moreover, in 1989, the industry is expected to spend $515 million to upgrade cable plant." Source: "Oversight Hearings" at 63 (Statement of James P. Monney); CR VOL. I.F, EXH. 11, CR 03509.

859. The record indicated that: "Moreover, cable operators are reinvesting revenues to expand and upgrade cable plant and equipment. In total, the cable industry spent approximately $417 million in 1988 to upgrade and rebuild cable plant, almost double the $217 million spent in 1984. That money means more channels and more options for consumers. In 1984, 57% of the nation's cable customers had accss to 30 or more channels. Today that figure is 81% and climbing. . . . This trend of increased expenditures to upgrade and rebuild plant is expected to continue. The cable industry is projected to spend approximately $515 million in 1989 to expand and upgrade cable plant, almost $100 million, or 24%, more than the industry's estimated expenditures in 1988."

Source: "Hearings on Competitive Problems," at 261-62 (Statement of James P. Mooney); CR VOL. I.H, EXH. 14, CR 05194-95.

860. The record included the following: "We are experiencing one of our periodic crunches in channel capacity. When the Cable Act passed only five years ago I think the average channel capacity of a cable system was between 20 and 24 channels. Today it is between 36 and 42 channels and we are rapidly moving toward a 54 channel standard. Very few new builds, for example, have channel capacities under 54, and a lot of rebuilds are going to 54 or even beyond, and so I expect that to loosen up somewhat." Source: "Hearings on Media Ownership" at 244 (Statement of Barry Litman); CR VOL. I.E, EXH. 10, CR 02967.

861. The record indicated that: "Currently, all of the top 20 MSOs, including many of the participants in these Comments, are employing fiber optics." Source: Comments of Adelphia Communications Corp., et al., in MM Docket No. 89-600 at 21 (March 1, 1990); CR VOL. I.T, EXH. 105, CR 12357.

862. The record included the following:

> Senator Burns. "I sure think that if we go the competitive route and allow the free market forces to take their usual trends—how long do yon think it will be before your industry goes to fiber and we get away from the copper.
>
> Mr. Robbins. We're doing that right now.
> Mr. Mooney. Extensively."

Source: "Oversight Hearings" at 178; CR VOL. I.F, EXH. 11, CR 03626.

63. The record included the following information from ATC, a large MSO:

> "The channel caapcity on a particular cable system is usually related to the age of the plant. Older systems generally have been channel capacity. But as outlined in Time Warner's Comments in Docket No. 89-600, the cable industry has spent substantial sums in the last several years building new systems and upgrading older table systems. These expenditures have resulted in a significant increase in average channel capacity. Today the average cable system has a 36 channel caapcity, while a decade age the average capacity was 12 channels. . . . ATC has spent over a billion dollars since 1983 in building and upgrading its cable systems. ATC's most recent new build in Queens, New York City provides over 700 channels of programming. Upgrades which will increase channel capacity are underway or planned in other systems."

Source: Response of James Chiddix, American Television & Communications Corp. (a Time Warner Company) to FCC Questions in MM 89-600 at 1-2 (rec'd May 2, 1990); CR VOL. I.X, EXH. 126, CR 14571-72.

864. The record indicated that: "The cable television industry has been delivering multiple video signals to American homes for decades, it is also fully capable of transmitting HDTV and pioneered the development of pay-per-view. *As cable operators continue to rapidly upgrade their systems—installing fiber where economically feasible —consumers who today can choose from dozens of cable channels soon will have a video menu of well over 100 options.* Such is the case with Time Warner's 150-channel system being deployed in Queens, New York." Source: "Hearings on Cable Television Regulation," at 596 (Testimony of Decker Anstrom) (emphasis added); CR VOL. I.J., EXH. 18, CR 07601.

865. NCTA also informed Congress that:

> "The main advantage of fiber is that signals can be carried greater distances with lower loss of power

and less subsequent need for amplification. The amplifiers needed to strengthen cable signals degrade the signals somewhat, and long stretches (or "cascades") of amplifiers over a given length of cable can eventually cause poor signal quality, or a loss in the number of channels that can be delivered. Fiber has a greater ability to carry signals without losing power, and thus fiber allows systems to reduce the number of amplifiers between the headend and the customer, or to eliminate amplifiers in longer results in overall lower plant costs, despite the current higher cost of fiber and associated electronics.

Improvements that result from the cable industry's installation of optical fiber include:

COST EFFECTIVE UPGRADES OF CHANNEL CAPACITY. The existing coaxial cable to every home is theoretically capable of carrying 100-200 channels. Reducing the number of amplifiers on a cascade between the headend and customer through the use of fiber allows significant channel upgrades without expensive replacement of the cable ot each individual home."

Source: "Hearings on Cable Television Regulation," at 555-56 (Testimony of Decker Anstrom); CR VOL. I.J, EXH. 18, CR 07560-61.

866. Similarly, NCTA advised Congress that:

"The cable industry's research and development concortium, CableLabs, currently envisions future cable systems to be hybrid fiber-coax systems. This design melds the evolutionary fiber trunking applications, as they are being implemented today, with coaxial cable in the drop to the home. CableLabs' vision anticipates that additional service capabilities will be developed under this design through interconnection with other communications technologies and services, as is the case with the TCI/AT&T/US

West joint venture ot provide video-on-demand in Denver.

Cable will not only increase its reach in the future, but the capabilities of the cable infrastructure will be dramatically improved. Industry plans call for spending $16.8 billion over the next ten years to upgrade plant and equipment, *and over 60 percent of existing systems will be overhauled*. Optical fiber will be an integral part of this upgrading, and by 1998 will account for one-third of the total annual investment in truck and feeder cable.

Through continued development and application of fiber optics, HDTV, customer addressability, and interactive services, the cable industry is at the forefront of communications technology and is ready to offer the video network of the future."

Source: "Hearings on Cable Television Regulation," at 559-60 (Testimony of Decker Anstrom) (emphasis added); CR VOL. I.J, EXH. 18, CR 07564-65.

867. The record included an assessment in an FCC Office of Planning & Policy Working Paper that: *"the one virtual certainty about the decade of the nineties is that the channel capacity of cable and other multi-channel media will greatly increase . . ."* Source: Comments of Chris-Craft Industries, Inc. in MM Docket No. 90-4 at 18 n.38, 39 (Sept. 25, 1991) (citing OPP Working Paper, *supra*, 6 FCC Rcd. at 4097-4098 (1991) (emphasis added); CR VOL. I.Q, EXH. 74, CR 11247.

868. The record indicated that: "Cable will not only increase its reach in the future, but the capabilities of the cable infrastructure will be dramatically improved. Industry plans call for spending $16.8 billion over the next ten years to upgrade plant and equipment, and over 60 percent of existing systems will be overhauled. Optical fiber will be an integral part of this upgrading, and by

1988 will account for one-third of the total annual investment in trunk and feeder cable." Source: "Hearings on Cable Television Regulation" at 559 (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07564.

869. Congress received testimony from Thomas Gillett, a Vice President of Cable Television Laboratories, Inc., the cable industry's research consortium. Mr. Gillett explained that "CableLabs is responsible for research and development on behalf of the cable industry in such areas as fiber optics, high definition advanced television, consumer interface, systems engineering and network planning." Source: "Hearings on Cable Television Regulation (Part I)," at 464 (Statement of Thomas F. Gillett); CR VOL. I.G, EXH. 13, CR 04661.

870. The record included the following information:

> Rep. Schaefer: Mr. Gillett, what's the cable industry doing to modernize . . . and improve the signal quality of the variety of services it provides? You say you are deploying fiber optics now.
>
> Mr. Gillett: Absolutely. Fiber is being used in what we could our backbone architecture now, where we take fiber out to a remote site—very much similar to how the telephone companies use fiber—and then we take a branch entry network the rest of the wy. The result of that is that the coax network into the house, which is very compatible with the existing TV in the house, delivers a higher quality signal and delivers more channels to that customer."

Source: "Hearings on Cable Television Regulation (Part I)," at 515 (Statement of Thomas A. Gillett); CR VOL. I.G, EXH. 13, CR 04712.

871. Congress was also advised that the "fiber-coax platform" that cable could provide was "ideal for evolving to serve enhanced needs." "This broadcast tree and

branch network is by far the optimum way to deliver the mega service of home television viewing. It is extremely efficient—and thus low cost, very user friendly because of its compatibility with the customers home electronics, is high capacity—the hybrid network can be expanded to deliver 140 video channels to the home, provides high picture quality—rivaling that available from home video equipment, and is highly reliable. Plus, it is the perfect platform from which evolutionary enhancements can be added in order to offer revolutionary new services." Source: "Hearings on Cable Television Regulation (Part I)," at 492 (Statement of Thomas F. Gillett); CR VOL. I.G, EXH. 13, CR 04689.

872. Congress was also informed of the following by Mr. Gillett:

> "Fiber optics has been shown by many industries as having a significant value when used. It ties together large capacity network nodes. I would emphasize that fiber optics is not a technology that is unique to the telephone industry. Indeed the cable industry is actively deploying fiber throughout its network."

Source: "Hearings on Cable TV Consumer Protection Act of 1989," at 341 (Statement of Thomas F. Gillette); CR VOL. I.H, EXH. 15, CR 05910.

873. Mr. Gillette also informed Congress that the telco's should not become involved in delivering television services because cable was already well-positioned to meet future demands:

> ". . . telco involvement in the downstream markets—which will inevitably distort competition in these markets—will have a severely negative effect upon U.S. competitiveness and will benefit only the telephone companies, not the national good. We already have the communications infrastructure necessary to provide all of the services envisioned in the 'information age.'"

Source: "Hearings on Cable TV Consumer Protection Act of 1989," at 346 (Statement of Thomas F. Gillette); CR VOL. I.H, EXH. 15, CR 05915.

874. Appearing before Congress subsequently, as President of Gillett, Lehman & Associates, Mr. Gillett explained that:

> "Fortunately, fiber is the cost effective long distance communications technology and fiber hybrid networks are already in many situations the right economic choice for local distribution by both telephone and cable companies. Therefore, fundamental business economics favor our country evolving to the right information age infrastructure without the need for massive governmental funds."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 70 (Feb. 28, 1992) (Statement of Thomas Gillett); CR VOL. I.K, EXH. 19, CR 08122.

875. Mr. Gillett also informed Congress that:

> "*On the cable television fiber/coaxial hybrid there will also be many enhancements. Capacity is growing to 1 gigahertz, digital transport is being added, two-way capabilities are expanding, and compression will soon be deployed.* And, by the way, for those unfamiliar with comparing a cable TV system's capacity to that of a phone system: with today's technologies, a conservative estimate would be that a one gigahertz cable system has the equivalent capacity of approximately twenty-eight thousand basic rate ISDN lines. I would like to emphasize that our Country already has a broadband to the home capability in place. With proper enhancement it could soon play a very important role in serving America with information age services."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 70 (Feb. 28, 1992) (Statement of Thomas Gillett) (emphasis added); CR VOL. I.K, EXH. 19, CR 08124.

876. The NCTA advised Congress in 1922 of the following:

> "One of the most unfortunate aspects of S.1200's industrial policy tilt toward the telephone companies is its lack of attention to the reality that cable companies, as well as telcos, are developing innovative fiber technologies. As early as 1982, cable companies began deploying fiber as a cost-efficient means interactive video and information services. *Recent developments have rendered fiber technology even more appealing and have warranted its aggressive deployment by cable systems throughout the country.* In fact, all of the twenty largest multiple system operators (MSOs) already have begun installation of fiber within their systems, with the amount of fiber installed by these companies increasing 400 percent since 1988 (see Appendix A, Cable Industry Use of Fiber). Current estimates indicate that the cable industry's deployment of fiber is expected to grow at an annual rate of 25 percent over the next decade."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 122

(Feb. 28, 1992) (Statement of Philip L. Verveer(,emphasis added); CR VOL. I.K, EXH. 19, CR 08174.

877. NCTA also advised Congress in 1992 that: *"The existing coaxial cable to every home is theoretically capable of carrying 160-170 channels* of standard, 6-Mhz NTSC television. Reducing the number of amplifiers in a cascade between the headend and customer through the use of fiber allows significant channel upgrades without expensive replacement of the cable 'drop' to each individual home." Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 122 (Feb. 28, 1992) (Statement of Philip L. Verbeer) (emphasis added); CR VOL. I.K, EXH. 19, CR 08174.

878. NCTA advised Congress in 1992 that cable had an incentive to deploy fiber because it would reduce operator costs:

> "Systems with many amplifiers spend more on maintenance because amplifiers must be 'balanced,' or electronically fine-tuned, in order to give the best performance. Because fiber reduces the number of amplifiers needed in a cascade, it takes less time to balance a line or find a faulty amplifier. These efficiencies can reduce a cable system's operating costs. For example, Cablevision Systems in Hammondsport, New York, estimates that it saves 500 employee-hours annually in maintenance costs by installing just ten miles of fiber."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S.1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at

122-23 (Feb. 28, 1992) (Statement of Philip L. Verveer); CR VOL. I.K, EXH. 19, CR 08174-75.

879. NCTA also advised Congress of the following in 1992:

> "The more evolutionary applications of fiber include the creation of 'fiber backbones' and 'Cable Area Networks' in which fiber links are constructed between the system headend and various points in the distribution network. These more extensive uses throughout the system bring fiber closer to the customer and eliminate heavy dependence upon amplifiers and other electronics to deliver television signals to the home. As noted earlier, reductions in amplifier cascades result in dramatic improvements in signal quality. The highly flexible system that results from evolutionary fiber deployment allows cable systems to deliver significantly more channels, improve system reliability, and reduce operating costs."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S.1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 123 (Feb. 28, 1992) (Statement of Philip L. Verveer); CR VOL. I.K, EXH. 19, CR 08175.

880. And NCTA advised Congress as follows:

> "Time Warner, which in 1988 introduced 'fiber backbone,' has begun deploying a new architecture called 'fiber trunk and feeder' (FTF). The FTF design takes fiber all the way into the feeder plant, which is the last stage before the actual connection to the home. This minimizes the use of coaxial cable to one mile or less and eliminates the use of all but two or three amplifiers in series. Time Warner is deploying this architecture in Queens and the Bronx

to provide subscribes with 150 channels of interactive video."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S.1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at at 123 (Feb. 28, 1992) (Statement of Philip L. Verveer); CR VOL. I.K, EXH. 19, CR 08175.

881. NCTA further advised Congress in 1992 that:

> "In the future, cable will both increase its reach and expand the capabilities of its infrastructure. Industry plans call for spending $18 billion over the next ten years to upgrade plant and equipment, and over 60 percent of existing systems will be overhauled. Optical fiber will be an integral part of this upgrading, and will soon account for one-third of the industry's total annual investment in trunk and feeder cable.
>
> *Through the continued development and application of fiber optics, HDTV, customer addressability, and interactive services, the cable industry is at the forefront of communications technologies and is ready to offer the video network of the future—today."*

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S.1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 124 (Feb. 28, 1992) (Statement of Philip L. Verveer) (emphasis added); CR VOL. I.K, EXH. 19, CR 08176.

882. Congress was told by the NCTA in 1992 that:

"Existing broadband facilities deployed by cable operators can deliver 150 channels of video; with digital compression, that number could reach 600." Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 127 (Feb. 28, 1992) (Statement of Philip L. Verveer) (emphasis added); CR VOL. I.K, EXH. 19, CR 08179.

883. The following information was in the record: NCTA informed Congress in 1992 that because of the foregoing facts—and NCTA's belief that entry into the cable business by telco's would lead to competitive problems—Congress should not enact legislation facilitating Telco delivery of information services, including television programming. Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 117-19 (Feb. 28, 1992) (Statement of Philip L. Verveer); CR VOL. I.K, EXH. 19, CR 08167.

884. For example, Congress was told:

> "Despite their rhetoric, the telcos do not enjoy a monopoly over the use of fiber optics. Cable television companies today are already using fiber optics, which enables cable operators to offer even greater channel capacity and a more reliable signal to subscribers. Currently, the 20 largest cable multiple system operators (MSOs) are using fiber optics in cable systems serving over 14 million subscribers.
>
> Unlike the telephone industry proposals, however, cable operators are utilizing fiber optics where it makes economic and technical sense—in long-haul trunking and feeder runs, where boosters and amplifiers limit cable ssytem channel capacity and signal quality.

Fiber optics carry a video signal over a greater distance with a lower loss of power and less need for amplification. By combining fiber optic trunking and feeder applications with the coaxial cable currently running from the curb into the home (and *which can carry more than 150 video channels*), cable systems need not rip out and replace their entire networks in order to bring consumers the benefits of fiber. Indeed, cable companies are bringing subscribers the benefits of fiber at lower cost than the telcos—a cost that will not be passed on to captive telephone ratepayers."

Source: Cable-Instructional TV and Communications Competitiveness and Infrastructure Modernization Act of 1991: Hearing on S. 1200 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation, 102d Cong., 2d Sess. at 136 (Feb. 28, 1992) (Statement of Philip L. Verveer); CR VOL. I.K, EXH. 19, CR 08188.

885. The record indicated that: "The existing coaxial cable to every home is theoretically capable of carrying 100-200 channels." Source: "Hearings on Cable Television Regulation" at 554 (Statement of Decker S. Anstrom;) CR VOL. L.J, EXH. 18, CR 07559.

886. The record also indicated that: "Recent developments have rendered fiber technology even more appealing and have warranted its aggressive development by cable systems throughout the country. In fact, all of the twenty largest multiple system operators (MSOs) have begun installation of fiber within their systems, with the amount of fiber installed by these companies increasing 600 percent since 1988. Current estimates indicate that cable industry deployment of fiber is expected to grow at an annual rate of 25 percent over the next decade." Source: "Hearings on Cable Television Regulation" at 554 (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07559.

887. The record included the following: "Deregulation has meant increased channel capacity to provide for all of this programming. Since 1984 the average channel capacity has increased by 40 percent, and we anticipate it will increase another 50 percent in the next 5 years." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 164 (Statement of James Kennedy); CR VOL. I.I, EXH. 17, CR 06628.

888. The record indicated that: "In fact, since 1984, the percentage of cable systems with more than 30 channels has risen from 38 to 67 percent (see Chart 7). Moreover, the cable industry plans to spend $16.8 billion in the coming decade to further upgrade plan and equipment. Much of this spending will be used to deploy fiber optic technology and enhance cable's existing broadband network, resulting in more channel capacity and better picture quality. (See for example Time Warner's announcement on March 7, 1991, that it would deploy a 150-channel interactive fiber cable system in New York by year's end.) Indeed, a leading industry analyst, Paul Kagan, estimates that cable's deployment of fiber will grow at an annual rate of 25 percent over the next decade." Source: "Hearings on Cable TV Consumer Protection Act of 1991" at 133, CR VOL. I.I, EXH. 17, CR 06597.

889. The following information was in the record: "As cable operators continue to rapidly upgrade their systems—installing fiber where economically feasible—consumers who today can choose from dozens of cable channels soon will have a video menu of well over 100 options. Such is the case with Time Warner's 150-channel system being deployed in Queens, New York. Moreover, TCI, AT&T, and US West have launched a joint venture in Denver, Colorado, to test two different video-on-demand systems." Source: "Hearings on Cable Television Regulation" at 596 (Statement of Decker S. Anstrom); CR VOL. I.J, EXH. 18, CR 07601.

890. The record indicated that: "The cable industry has set the technological pace for television over the last 15 years and it will continue to do so. There has been considerable discussion lately about the potential of fiber technology to increase channel capacity and picture quality. The telephone industry promises to bring fiber into U.S. homes—but Bell Labs estimates that it will cost telephone ratepayers $200-$500 billion dollars. And it will take 25 years. By contrast, Time Inc.'s ATC has pioneered the use of fiber technology for cable. Because of the unique design of cable systems, our industry will bring the benefits of fiber to consumers for $2 billion and in less than 10 years." Source: "Hearings on Competitive Problems" at 123-24 (Statement of Gerald M. Levin); CR VOL. I.H, EXH. 14, CR 05056-57.

891. The record indicated that: "In 1984, 57 percent of the nation's cable customers had access to 30 or more channels. Today that figure is 87 percent and climbing. Another recent trend is conversion to addressable converters, a technology that can provide consumers with pay-per-view options. In 1984, only 18 percent of cable households had addressable converters. By the end of 1989, that number will have grown to 38 percent and will rise rapidly. This pattern of increased expenditures to upgrade and rebuild plant is expected to continue." Source: "Oversight Hearings" at 65 (Statement of James P. Mooney); CR VOL. I.F, EXH. 11, CR 03511.

892. Congress was aware of these developments: "The evidence presented to the Committee on developments in the cable industry indicates that cable system channel capacity is likely to continue to expand, diminishing any incidental restrictions of the availability of cable channels for nonbroadcast programming." Source: "1991 Senate Report" at 56 (citing "To Fill or Not to Fill," *Cable-Vision*, February 11, 1991, at 24); CR VOL. I.A, EXH. 3, CR 00316.

XI. THE CABLE INDUSTRY'S OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF ITS POSITION TO BOTH CONGRESS AND THE FCC.

893. The President of the National Cable Television Association ("NCTA") testified regarding cable carriage issues before the House Subcommittee on Courts, Civil Liberties and the Administration of Justice of the Judiciary Committee on September 18, 1985. NCTA indicated that it was "the principal trade association of the cable television industry," and that its "members include more than 2,000 cable television systems operating throughout the United States." Source: *CRT Reform and Compulsory Licenses: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House Committee on the Judiciary*, 99th Cong., 1st Sess. (June 19, 1985) (Testimony of James Mooney); CR VOL. I.B, EXH. 6, CR 00947.

894. The President of the NCTA, the President of Home Box Office, Inc, the Chairman and Chief Executive Officer of Continental Cablevision, Inc, and the Vice President of Government Affairs for Tele-Communications, Inc., testified on competitive issues involving the cable industry, including cable carriage issues, before the Senate Subcommittee on Antitrust, Monopolies and Business Rights of the Judiciary Committee, on March 17, 1988. Source: "Hearings on Competitive Issues"; CR VOL. I.C, EXH. 8, CR 01333.

895. The President of the NCTA testified regarding carriage and other issues before the House Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce on March 30, 1988, on behalf of NCTA's membership of cable operators "serving more than 80% of the 45 million cable households in the United States, and 56 cable programming services. . ." Source: "Hearings on Cable Television"; CR VOL. I.D, EXH. 9, CR 02131. The President of the Community

Antenna Television Association, the Chairman of Continental Cablevision, Inc., the President of Tele-Communications, Inc., and the President of Turner Broadcasting Systems, Inc. also testified at this hearing. *Id.*, CR 02082.

896. The President of the NCTA, the President of Tele-Communications, Inc., the Chairman and CEO of the Discovery Channel, and the President of Black Entertainment Television testified (or submitted statements) on cable carriage, competition and other issues at the Hearings on "Media Ownership: Diversity and Concentration," before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, in June of 1989. Source: "Hearings on Media Ownership"; CR VOL. I.E, EXH. 10, CR 02721.

897. The President of the NCTA, and the Chairman of Tele-Communications, Inc., testified on cable carriage and other issues before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transpotration, in November 1989. Source: "Oversight Hearings"; CR VOL. I.F, EXH. 11, CR 03442.

898. The President of NCTA, the President of the Community Antenna Television Association, and the President of Black Entertainment Television, testified at the "Must Carry" Hearings before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation on October 25, 1989. Source: "Hearings on Must Carry"; CR VOL. I.F, EXH. 12, CR 04008.

899. The President of NCTA, the Chairman of The Discovery Channel, the Vice President of Cable Television Laboratories, Inc., and the President of Cox Cable Communications, Inc., and the President of Cox Cable Communications, testified at the Hearings on Cable Television Regulation (Part I), before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce, in March and April of 1990.

Source:"Hearings on Cable Television Regulation (Part I)"; CR VOL. I.G, EXH. 13, CR 04195.

900. The President of NCTA testified on behalf of its membership on carriage and other competitive issues at hearings before the Subcommittee on Antitrust, Monopolies and Business Rights of the Senate Judiciary Committee on April 12, 1990. Source: "Hearings on Competitive Problems"; CR. VOL. I.H, EXH. 14, CR 04930.

901. The President of the NCTA, another representative of the NCTA, the Chairman and CEO of Continental Cablevision, Inc., and Thomas Gillette, President of Cable Television Laboratories, Inc., testified on cable carriage and other cable competition issues before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation in March and April of 1990. Source: "Hearings on Cable TV Consumer Protection Act of 1989"; CR. VOL. I.H, EXH. 15, CR 05571.

902. The President of the NCTA appeared as a representative of "companies which own systems serving over 90 percent of the more than 53 million cable households in the United States" as well as "56 cable programming services," and testified on cable regulation issues before the Subcommittee on Telecommunications and Finance of the House Committee on Energy and Commerce in May 1990. Source: "Hearings on Cable Television Regulation (Part 2)"; CR VOL. I.I, EXH. 16, CR 06166.

903. The President of the NCTA, and the President and Chairman of Turner Broadcasting Systems, Inc., and the Chairman and CEO of Cox Enterprises, Inc., testified on various issues relating to cable competition and regulation before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation in March of 1991. Source: "Hearings on Cable TV Consumer Protection Act of 1991"; CR VOL. I.I, EXH. 17, CR 06460.

904. The President of the NCTA, the Executive Vice President of the NCTA, a third representative of the NCTA, the Chairman and CEO of Continental Cablevision, Inc., the Chairman and CEO of C-Span, and the Chairman of the Discovery Channel, testified on cable competition issues, including carriage issues, before the Subcommittee on Telecommunications and Finance of the House ommittee on Energy and Commerce in March and June of 1991. Source: "Hearings on Cable Television Regulation"; CR. VOL. I.J, EXH. 18, CR 07003.

905. Thomas Gillett of Gillett, Lehman & Associates (and former President, of Cable Laboratories), a representative of the NCTA, and the Chairman and CEO of Discovery Communications, Inc. testified on cable competition, technology, and channel capacity issues before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation on February 28, 1992. Source: "Hearings on Syndicated Exclusivity"; CR. VOL. I.K, EXH. 20, CR 08049.

XII. THE SCOPE OF THE RECORD BEFORE CONGRESS.

MM Docket No. 90-4

906. The Report of the Senate Committee on Commerce, Science and Transportation explains that: "[t]he FCC is conducting two proceedings that examine market power in the cable television industry. The filings from the various parties in these proceedings have proven very useful for the Committee in its inquiry." Source: "1990 Senate Report" at 9 & n.20; CR VOL. I.A, EXH. 1, CR 00036. *See also id.* at 5 n.7 (noting that "[t]he Commission may adopt a decision in this proceeding (MM Docket 90-4) sometime later in July, 1990").

907. The Senate Committee on Commerce, Science and Transportation issued another report in 1991, explaining the FCC's action based on the proceedings in

MM Docket No. 90-4 and again explaining that the filings in that proceeding had proven very useful to the Committee. Source: "1991 Senate Report," CR VOL. I.A, EXH. 3, CR 00268 & n.1, CR 00269 & n.18.

908. A number of pleadings in MM Docket No. 90-400 are specifically cited for support in the 1992 Report of the House Committee on Energy and Commerce. Source:: "1992 Conference Report"; CR VOL. I.A, EXH. 5, CR 00431 n. 50 (citing Comments of the NAB, MM Docket No. 90-4, Sept. 25, 1991, at 24-32); CR 0432 n. 59 (citing Comments of the NAB, MM Docket No. 90-4, Sept. 25, 1992, at 8-9; CR 00432 n. 57 (citing Comments of the NAB, MM Docket 90-4, Sept. 25, 1991, at 27); CR 00412 n. 56 (citing Comments on KMTR, Inc., MM Docket No. 90-4 (filed Aug. 14, 1991); CR 0439 (citing Reply Comments of NAB in MM Docket No. 90-4, Oct. 25, 1991); 3 n. 62 (citing Fratrik, "A-B Switch Availability and Use," Sept. 23, 1991 attached to Comments of the National Association of Broadcasters, MM Docket No. 90-4, Sept. 25, 1991).

MM Docket No. 89-600

909. Similarly, the Report of the Senate Committee on Commerce, Science and Transportation also specifically referenced MM Docket No. 89-600 and indicates that the pleadings filed by "the various parties" in that proceeding "have proven very useful for the Committee in its inquiry." Source: "1990 Senate Report" at 9 & n.20; CR VOL. I.A, EXH. 1, CR 00036.

910. MM Docket No. 89-600 was commenced pursuant to Congress' directive to Section 623(h) of the Cable Communications Policy Act of 1984, 47 US.C. § 543(h), "to conduct a study of the cable industry's operations under the Cable Act and, based on that study, to prepare and submit to Congress a report analyzing the effect on the video services marketplace of substituting market forces for cable rate regulation and, if appropriate, to

recommend legislation." The Commission explained that it opened "this comprehensive inquiry as our first step" in preparing to report to Congress. *Notice of Inquiry*, MM Dock. No. 89-600, 5 FCC Rcd. No. 2, at 362, ¶ 1 (Rel. Dec. 29, 1989).

911. The proceedings in MM Docket No. 89-600 culminated in a formal report to Congress. Source: FCC Report, "In the Matter of Competition, Rate Regulations and the Commission's Policies Relating to the Provision of Cable Television Services," MM Docket No. 89-600 (July 31, 1990); FCC Report, "In the Matter of Competition, Rate Deregulations and the Commission's Policies Relating to the Provision of Cable Television Service," MM Docket No. 89-600 (July 31, 1990) CR. VOL. I.L, EXH. 23, CR 08973.

912. Many of the pleadings in MM Docket No. 89-600 are specifically cited in the congressional committee reports. Source: "1990 Senate Report" at n.21, CR VOL. .IA, EXH. 1, CR 00036 (citing NCTA Comments in MM Dock. No. 89-600); CR 00038 (citing Reply Comments of the United States Department of Justice in MM Docket No. 89-600, p. 23); CR 00041 (citing Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the FTC in MM Docket No. 89-600, p. 13); CR 00045 (citing Comments of the NCTA in MM Docket No. 89-600, p. 26); "1990 House Report," CR VOL. I.A, EXH. 2, CR 00151 (citing "Cable Television Service, MM Docket No. 89-600, rel. July 31, 1990, at 149); CR 00155 n.70 (citing Comments of the NAB in MM Dock. No. 89-600 (March 1, 1990); *id.* (citing Reply Comments of the NAB in MM Docket No. 89-600, April 2, 1990); "1991 Senate Report," CR VOL. I.A, EXH. 3, CR 269 n. 18 (noting that the filings in MM Docket No. 90-4 and 89-600 have been "very useful" to the Committee); *id.* at CR 00268-279 (citing various pleadings from MM Docket No. 89-600).

MM Docket No. 88-138

913. The proceedings in MM Docket No. 88-138, were specifically incorporated into the record of MM Docket No. 89-600. *Notice of Inquiry*, MM Dock. No. 89-600, 5 FCC Rcd. No. 2, at 363, ¶ 9 (Rel. Dec. 29, 1989) ("We note that there are several pending Commission proceedings and petitions that contain information relevant to our inquiry. For this reason, we have decided to terminate the following two proceedings and to make the records developed in each of them a part of the record in this inquiry: . . . (b) MM Docket No. 88-138, our Cable Signal Carriage Inquiry").

914. Many of the pleadings in MM Docket No. 88-138 are specifically cited in the congressional committee reports. Source: "1992 House Report," at n.50; CR VOL. I.A, EXH. 4, CR 00431 (citing Comments of NAB in MM Docket No. 88-138, July 8, 1988 and NAB Reply Comments in MM Docket No. 88-138, July 8, 1988); CR 00449 n.103 (citing NAB comments); *see also* "1990 House Report," CR VOL. I.A, EXH. 2, CR 00149-51 (citing these commentsf rom MM Dock. No. 88-138).

MM Docket No. 85-349

915. Congress was also aware of the proceedings commenced by the FCC—MM Dock. No. 85-349—after the *Quincy* decision.[4] Source: "1992 House Report," at n.43, 44; CR VOL. I.A, EXH. 4, CR 00428.

916. Many of the pleadings in MM Docket No. 85-349 are specifically cited in the congressional committee reports. Source: "1992 House Report," at n.60; CR VOL. I.A, EXH. 4, CR 00433 (citing NAB & NCTA Joint Petition for Reconsideration in MM Docket No. 85-349, Dec. 17, 1986); "1991 Senate Report," CR VOL. I.A, EXH. 3, CR 00305 n. 115 (citing Joint Request

[4] *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986).

for Stay Pending Reconsideration filed by NAB, NCTA and CATA in MM Docket No. 85-349, Dec. 17, 1986); *id.* n. 116 (citing ELRA Group, Inc, "Outdoor Antennas, Reception of Local Television Signals and Cable Television," Jan. 28, 1986); "1990 Senate Report," CR VOL. I.A, EXH. 1, CR 00062 n.103. *See also* Letter from Senator John C. Danforth to Mark S. Fowler, Chairman, FCC, filed in MM Docsket No. 85-349 at 18 (July 22, 1986) (citing "Comments of the INTV in MM Docket No. 85-349); CR VOL. I.CC, EXH. 179, CR 16601.

[Signature Block Omitted]

Dated: May 26, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

PUBLIC BROADCASTER DEFENDANT-INTERVENORS' SUPPLEMENTAL STATEMENT OF EVIDENCE BEFORE CONGRESS

* * * *

Dated: May 26, 1995

PUBLIC BROADCASTER DEFENDANT-INTERVENORS' SUPPLEMENTAL STATEMENT OF EVIDENCE BEFORE CONGRESS

Intervenor-defendants, the Association of America's Public Television Stations ("APTS"), the Public Broadcasting Service ("PBS"), and the Corporation for Public Broadcasting ("CPB") (collectively "the public broadcasters"), submits this statement in support of their motion for summary judgment. This statement supplements Defendants' Joint Statement of Evidence Before Congress filed in connection with the summary judgment motions of all defendants. In this document, references to the record before Congress signify the record in connection with Congress's consideration of "must-carry" provisions for public television, eventually enacted as Section 5 of the Cable Television Consumer Protection and Competition Act of 1992. Pub. L. No. 102-385, 106 Stat. 1460 (1992), *codified at* 47 U.S.C. § 535 (West. Supp. 1995).

I. EVIDENCE THAT CABLE CARRIAGE IS IMPORTANT TO FULFILLMENT OF PUBLIC TELEVISION'S MISSION TO PROVIDE UNIVERSAL ACCESS TO AN ALTERNATIVE, NON-COMMERCIAL PROGRAMMING SOURCE

A. Evidence Regarding the Unique Nature of Public Television Programming

1. Congress was aware that: "The Federal government recognized the need for noncommercial broadcasting as early as 1952 when 242 channels were set aside in the spectrum by the FCC for the exclusive use of public television. Since that time, Congress repeatedly and unequivocally has supported public telecommunications services." Source: *Cable Television Consumer Protection and Competition Act of 1992*, H.R. Rep. No. 628, 102d Cong., 2d Sess. at 68 (June 29, 1992) (hereafter "1992 House Report"); CR OL. IaAa, EXH. 4, CR 00447.

2. Congress was reminded that it had "recognized that the 'marketplace' alone could not be relied upon to make adequate provision for noncommercial, educational uses." *Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportation* at 95 (hereafter "1989 Senate Hearings") (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04105.

3. Congress was also reminded of its previous determination that "it furthers the general welfare" to encourage public broadcasting "which will be responsive to the interests of people both in particular localities and throughout the United States, which will constitute an expression of diversity and excellence, and which will constitute a source of alternative telecommunications service for all citizens of the nation. . . ." 1989 Senate Hearings at 95 (Testimony of David Brugger) (quoting 47 U.S.C. § 396(a)(4) (1991)); CR VOL. I.F, EXH. 12, CR 04105.

4. The record before Congress included the following summary of previous congressional enactments regarding public television:

- In renewing and expanding funding for facilities construction in 1976, Congress repeated its intent that public television should serve as "a source of high quality programming responding to the educational needs and interests of our diverse population and *supplementing the existing commercial broadcasting system.*" Comments of the Association of America's Public Television Stations (hereafter "APTS") in MM 90-4 at 16 (Feb. 14, 1991) (CR VOL. I.D, EXH. 43, CR 10123); Comments of APTS in MM 89-600 at 7 (CR VOL. I.T, EXH. 103, CR 12189) (both quoting S. Rep. No. 447, 94th Cong., 1st Sess. 3 (1975) (emphasis added)).

- In 1978, Congress again noted that "[a] strong and varied public broadcasting system has a crucial role to play. Because it is free of the scramble for ratings, public broadcasting has room for experimentation and risk-taking. Public broadcasting is for all Americans. *It can meet the needs of audiences that number in the millions but are seldom served anywhere else.*" Comments of APTS in MM 90-4 at 16-17 (Feb. 14, 1991), CR VOL. I.O, EXH. 43, CR 10123-23; Comments of APTS in MM 89-600 at 8, CR VOL. I.T, EXH. 103, CR 12190 (both quoting H.R. Rep. No. 1178, 95th Cong., 2d Sess. 4 (1978) (in turn quoting President Jimmy Carter) (emphasis added)).

- In 1981, Congress repeated its view that public television was to bring to the American public "the very best in television programming, . . . *that which is unavailable anywhere else*, and to develop programs that meet the needs of *underserved and diverse audiences throughout the country.*" Comments of APTS in MM 90-4 at 17 (Feb. 14, 1991), CR VOL. I.D, EXH. 43, CR 10124; Comments of APTS in MM 89-600 at 8, CR VOL. I.T, EXH. 103, CR 12190 (quoting H.R. Rep. No. 82, 97th Cong., 1st Sess. 7, 21 (1981) emphasis added)).

- In 1988, Congress reaffirmed that public television has an "original mandate" to serve as "an *educational, innovative, and experimental alternative to commercial broadcasting*, and should continue to create, develop, and broadcast innovative and diverse new forms of programming." Comments of APTS in MM 90-4 at 17 (Feb. 14, 1991), CR VOL. I.O, EXH. 43, CR 10124; Comments of APTS in MM 89-600 at 9, CR VOL. I.T, EXH. 103, CR 12191 (quoting H.R. Rep. No. 825, 100th Cong., 2d Sess. 10 (1988) emphasis added).

5. The record before Congress included the following: "Public television stations are non-profit, educational, public service institutions with their roots in the community, dedicated to the community's service." Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

6. The record before Congress described public television stations' unique local programming targeted to minorities and other special audiences. Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

7. The record before Congress included the following: "Public television stations constitute the only locally controlled programming service in the United States whose sole purpose is to produce and distribute educational, informational, cultural and instructional programming at the community level." Source: Comments of APTS in MM 90-4 at 8 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10795.

8. There was testimony before Congress that: "Public television stations are not passive local outlets for packaged satellite services and advertising messages originated hundreds or thousands of miles away; they are non-profit public service institutions with their roots in the community, dedicated to its service. Indeed, with the recent trends in broadcast acquisitions, mergers and buyouts, [public television] may well become the last bastion for truly local control in the broadcast and cable industries." Source: *Cable Television: Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 101st Cong., 2nd Sess. (March 30 and May 11, 1988) at 523 (hereafter "1988 House Hearings") (Statement of David Brugger); CR VOL. I.D, EXH. 9, CR 02612.

9. The record before Congress indicated that public television stations are locally controlled and locally based, in many cases by state education agencies, and that "nationwide public television spent almost $530 million (or 40% of its resources) in 1989 on local production, instructional programming, and other community services." Source: *Cable Television Regulation: Hearings on H.R. 1303 and H.R. 2546 Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce*, 102d Cong., 1st Sess. (March 20, June 18 and 27, 1991) at 839 (hereafter "1991 House Hearings") (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07843.

10. Congress was informed that: "Public television can provide programs that would otherwise never reach American audiences. [Public television is] willing to air programs that commercial broadcasters, for obvious economic reasons, cannot." Source: 1991 House Hearings at 837 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07841.

11. The record before Congress included the following testimony:

> Today, public broadcasting is the only locally-controlled service among the communications media of the United States whose sole purpose is to produce and distribute programs designed to serve the public and educational interests, rather than commercial interests. Television increasingly has become viewed only as a business—and most of the television in America today is big business. Distinct from commercial and cable television, however, public television's objective is to satisfy viewers needs, impart knowledge and understanding, and open doors to the vast range of our cultural diversity—*not* to deliver advertisements to audiences. Public television stations are nonprofit, educational, public service institutions with their roots in the community, dedicated to the community's service.

1989 Senate Hearings ta96 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

12. The following testimony also appeared in the record before Congress:

> [Public television is], quite simply, different. We are public, non-profit, a national resource available to every American. There are no monthly cable charges, no three minute breaks for commercials, no effort on our part to exchange quality for quantity because of the dictates of the market. If we behave differently than our colleagues in the telecommunications industry it is because we are different. We have different goals, a different agenda, and a different definition of what we deem success.

1991 House Hearings at 841 (Testimony of Henry Becton); CR VOL. I.J, EXH. 18, CR 07845.

13. The record before Congress also included a submission from 18 state broadcasting networks, which noted that "state governments support public television networks in order "to fill a void in public affairs and cultural programming." Source: Comments of State Public Broadcasting Networks in MM 85-349 at i; CR VOL. I.CC, EXH. 166, CR 16227.

14. The record before Congress revealed that in 1984, twenty-three States plus Puerto Rico and the Virgin Islands directly operated public stations, and another twenty states provided direct funding to public or non-commercial stations not licensed to the State. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 23; CR VOL. I.CC, EXH. 166, CR 01625.

15. The record before Congress indicated that "public television provides a variety of unique services to their communities. These include local news and public affairs

programs, and coverage of local cultural groups and governmental activities, such as city council meetings, school board sessions, and state legislative sessions." Source: Comments of the Corporation for Public Broadcasting (hereafter "CPB"), the National Association of Public Television Stations (hereafter "APTS") and the Public Broadcasting Service (hereafter "PBS") in MM Docket No. 85-349 at 15 (Jan. 29, 1986); CR VOL. I.BB, EXH. 163, CR 15988.

16. The record before Congress included the following:

> [T]he Nashville Board, the school board licensee of public television Station WDCN in Nashville, Tennessee, carries the Nashville Metropolitan Government Council meetings on alternate Tuesday. . . . Similarly, the Nashville Board airs a weekly program entitled Tennessee Outdoorsman. This is a local program meeting local needs, as is Tennessee Arts, shown alternate Tuesday. Tennessee Arts is not only shown to the local Nashville audience but is aired throughout Tennessee by other public television stations. Nashville Business Edition, aired weekly, is a uniquely local service. The Tennessee Teachers program, aired monthly, serves specialized needs of a vital audience. PBS does not meet these needs; commercial television in Tennessee does not meet these needs and no national centralized originating program source could begin to meet these needs. The loss of this kind of service is irreparable. The fact that mass markets cannot be attracted to support this programming is irrelevant. There is a societal value in this kind of local programming which commercial networks and cable systems do not recognize or seek to foster.

Source: Joint Comments of Metro Board of Education, *et al.* in MM Docket 85-349 at 10 (April 25, 1986); CR VOL. I.CC, EXH. 172, CR 16502.

17. The record before Congress included the following statement: "Importantly, recognition by Congress of the continuing need for public television services came even as cable penetration passed 50 percent and as commercial cable channels were multiplying." Source: Comments of APTS in MM 89-600 at 9 n.11 (citing H.R. Rep. No. 825, 11th Cong., 2d Sess. 10 (1988)); CR VOL. I.T, EXH. 103, CR 12191.

18. The record before Congress indicated that: "Cable services may offer some programs that resemble some of public television's offerings, but they do not have public television's educational purpose and commitment to local service." Source: 1989 Senate Hearings at 97 (Statement of David Brugger); CR VOL. .IF, EXH. 12, CR 04107.

19. The record before Congress included the following statement: "There are many more cable programming choices available today than five years ago. . . . Public television programming remains distinctive and unique. Viewers continue to show their support for this important public service by contributing to their local stations and encouraging increased tax-based support." Source: 1989 Senate Hearings at 108 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04118.

20. The record before Congress indicated that the "marketplace cannot do the job of protecting the public's interest in high-quality, innovative educational programming. A separate public broadcasting service will continue to be needed, and viewer access to it will have to be assured." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I,J, EXH. 18, CR 07839.

21. There was evidence before Congress that the "cable-only" Learning Channel had only been able to commit 37% of its programming to instructional television, and that much of that was originally produced by

public television. Source: 1991 House Hearings at 858 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07842.

B. Evidence of the Diversity of Programming Among Public Television Stations.

22. There was evidence before Congress that: "In many markets, especially those with large and diverse populations, the local community supports more than one public television service." Source: 1989 Senate Hearings at 105 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04115.

23. The record before Congress indicated that "[i]n most markets where there are two or more public television stations, the stations are licensed to different types of entities—*e.g.*, nonprofit organizations (community licensees), school boards, state educational institutions—and th edifferent missions and goals of these different types of licensees result in materially different programming services." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 14 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

24. The record before Congress included the following statement: "[S]tudies of the actual program schedules of multiple public television station serving the same market show that, with rare exceptions, those stations offer a substantial diversity of programming, either in the actual programs carried or in the time at which the same program is carried." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 14 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

25. There was testimony before Congress that 80 percent of public television programming is unduplicated.

Source: 1988 House Hearings at 597 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02684.

26. The record before Congress included evidence that, in Boston, which has two public TV stations, only 2% of programming is duplicated. Source: *Cable Television Regulation (Part 2): Hearings Before the Subcommittee on Teelcommunications and Finance of the Committee on Energy and Commerce*, 101st Cong., 2d Sess. (May 9 and 16, 1990) at 96 (hereafter "1990 House Hearings")—Statement of George Miles); CR VOL. I.I, EXH. 16, CR 06263.

27. There was evidence in the record before Congress that during one prime time evening in New York, there was no duplication in programming among six public television stations. Source: 1990 House Hearings at 96 (Statement of George Miles); CR VOL. I.I, EXH. 16, CR 06263.

28. The record before Congress included the results of a 1978 survey conducted by CPB, which showed that of "a total of 185 different programs broadcast in the Los Angeles market during the week of January 9-15, 1978, approximately 125, or 68%, were broadcast by only one of the three public television stations in the market. Similar results were reported in the other three markets" surveyed. Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 15 (Oct. 175, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

29. The record before Congress also included the results of a survey by CPB during the week of May 11-17, 1985, which showed that of the five separately programmed local public television stations whose signals reach all or part of the Washington, D.C. market, there were a total of 321 different programs, of which only 31.5% were offered by more than one of the five stations. "Even with respect to this limited number of programs

offered by more than one station, the stations aired the programs at different times, so that the same program was broadacst simultaneously by more than one station only 26% of the time." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 15 (Oct. 15, 1985); Appendixto Memorandum of Points and Authorities, Vol. 5 at Tab R.

30. The record before Congress included a letter explaining that, in the San Francisco area, KQED, KTEH, and KCSM have largely nonduplicative programming. Source: Letter from David Brugger to Congressman Markey (July 26, 1991) in 1991 House Hearings at 1039; CR VOL. I.J, EXH. 18, CR 08041.

C. Evidence Regarding Public Television's Mission of Universal Access

31. Congress recognized that:

> [I]n the Public Broadcasting Act of 1976 . . ., Congress specifically found that . . . "it is necessary and appropriate for the Federal Government to complement, assist and support a national policy that will most effectively make [public broadcasting services] available to all the citizens of the United States." Congress has authorized almost $400 million since 1962 to build and improve public television facilities to "extend delivery of public telecommunications services to as many citizens of the United States as possible" and as recently as 1988 authorized $200 million through FY 1993 to replace and upgrade the satellite systems carrying public telecommunications services to stations across the country. Unimpeded access to public television programming is such an important telecommunications objective that Congress requires that the Public Broadcasting Service (PBS) maintain one clear, unencrypted satellite feed for use by satellite dish owners in unserved areas.

Source: 1992 House Report at 68 (emphasis added) (internal citations omitted); CR VOL. I.A, EXH. 4, CR 00447.

32. The record before Congress indicated that the Public Broadcasting Act was founded on the principle that all Americans must have access to public television. Source: 1991 House hearings at 831 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07835.

33. The record before Congress indicated that "public television has a unique orientation. "[Its] stake is in ensuring that universal access to noncommercial educational programming remains a guiding principle." Source: 1991 House Hearings at 834 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07838.

34. The record before Congress included testimony that public television "seek[s] to reach every American, and particularly those on the margin of our society." Source: 1991 House Hearings at 841 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07845.

35. The record before Congress included a description of new technology developed by public television to reach special audiences, such as the visually impaired and hearing impaired. Source: 1991 House Hearings at 840 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07844.

36. The record before Congress indicated that: "[Public television] is trying to reach all Americans of different tastes and different backgrounds." Source: 1991 House Hearings at 837 (Statement of Henry Becton); CR VOL. I,J, EXH. 18, CR 07841.

37. The record before Congress included testimony that public television "bring[s] a variety of new experiences and viewpoints to all Americans in our cities and in our rural areas, whether or not they can afford to subscribe." Source: 1991 House Hearings at 837 (Testimony of Henry Becton); CR VOL. I.J, EXH. 18, CR 07841.

38. The record before Congress included the following statement on behalf of state public broadcasting networks: "State funding from general tax revenues is frequently predicated on universal access to educational programming by a state's population." Source: Comments of State Public Broadcasting Networks in MM 85-349 at 11-12 & n.10; CR VOL. I.CC, EXH. 166, CR 16239-40.

39. The record before Congress included testimony by a public television representative that: "There is a need to assure that the American public has access to public television services that it supports through its tax dollars and through its direct contributions," and refers to the public's right to its tax-supported services provided by stations that are, for the most part, licensed through public supported state and local institutions. Source: 1989 Senate Hearings at 89 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04099.

40. The record before Congress included the statement that the public has "the right to expect guaranteed access to public interest programming of public television." Source: 1991 House Hearings at 833 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07537.

41. The record before Congress included testimony by a public television station representative that: "What we want is equity for all citizens. That means that you must assure access to public TV services as a public right and not a class privilege." Source: 1989 Senate Hearings at 90 (Testimony of David Brugger); CR VOL. I.F, EXH. 12, CR 04100.

D. Evidence About the Importance of Cable Carriage to Achieving Universal Access

42. The record before Congress included testimony that "public television viewers are 27 percent more likely to subscribe to cable than non-public television viewers" and that "[t]wo-thirds of cable subscribers say one of the

reasons they subscribe is for better reception of a PBS station or access to more than one public station." Source: 1988 House Hearings at 524 (Statement of David Brugger); CR VOL. I.D, EXH. 9, CR 02613.

43. The record before Congress included testimony that "cable has extended the reach of some public television stations. . . . Four percent [of public television's coverage] is due to cable's extension of over-the-air reach. Source: 1989 Senate Hearings at 92 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04102.

44. The record before Congress indicated that in Northern California "three public television stations in partnership with sixty-four offices of education and 600 school districts provide instructional services to 70,000 teachers and 1.5 million students. The delivery of this important serviec to classrooms is, in many instances, dependent on local cable operators' decision to place and maintain the public television services on their schedule." Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.K, EXH. 12, CR 04106.

45. The record before Congress indicated that "in the case of two-thirds of America's public television stations, to impede access to their services is to disrupt the ability of state governments, universities and local government—the stations' licensees—to educate, communicate with and serve their citizens." Source: 1989 Senate Hearings at 96 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106.

46. The record before Congress included testimony that: "For public television to achieve the public interest goals set for it by Congress and expected of it by the American public, carriage of public television services on cable systems must continue." Source: 1989 Senate Hearings at 93 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04103.

47. The record before Congress included the following statement: "For public television, cable carriage is par-

ticularly important since more than 60% of public television stations currently . . . operate in the UHF band and virtually all of the public television stations remaining to be constructed in the future will be UHF. . . . As the [FCC] has recognized on numerous occasions, UHF stations suffer from severe technical handicaps which limit their ability to reach viewers in their service areas. Cable carriage, while not a panacea, alleviates those problems and improves the ability of those stations to reach their audiences." Source: Joint Petition of CPS, APTS, and PBS for Rulemaking at 8-9 (Oct. 15, 1985) (citing *Report and Order, Docket No. 78-391* 90 F.C.C. 2d 1121, 1124-25 (1982)); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

48. The record before Congress included testimony that: "Since more than 62 percent of public television stations operate on UHF channels, cable also has improved the reception quality and ease of access to public television signals for many viewers." Source: 1989 Senate Hearings at 92 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CH 04102.

49. The record before Congress indicated that retransmission consent/leased access is inappropriate for public television stations because it did not advance the goal of universal access, even though some stations might benefit financially. Source: *Cable TV Consumer Protection Act of 199*[*: Hearing on S. S. 12 Before the Subcommittee on Communications of the Committee on Commerce, Science, and Transportaiton,* 102d Cong., 1st Sess. (March 14, 1991) at 459 (Letter from David Brugger to Senator Inouye) (Mar. 31, 1991); CR. VOL. I.I, EXH. 17, CR 06917.

50. The record before Congress also indicated that "[additional funding . . . [is] not more important than universal access to all unduplicated public television services." Source: 1991 House Hearings at 848 (Letter from David Brugger to Congressman Markey (June 26, 1991); CR VOL. I.J, EXH. 18, CR 07852.

51. The record before Congress included the following statement by a public television representative: "Absent mandatory cable carriage requirements, there is a substantial likelihood that citizens who have supported local public television services will be deprived of those services. Public television services, which have been funded by tax sources, are intended to be universally available because of their essential public service value." Source: 1991 House Hearings at 847 (Letter from David Brugger to Congressman Markey (June 26, 1991)); CR VOL. I.J, EXH. 18, CR 07851.

52. The record before Congress included the following statement by a public television representative: "The American people should have access to the public television programs that they fund. If the FCC or the courts will not act to allow taxpayers cable access to the public television programs they fund, then I believe that Congress should." Source: 1988 House Hearings at 601 (Letter from Donald Ledwig to Representative Markey (Apr. 8, 1988); CR VOL. I.D, EXH. 9, CR 02688.

53. The record before Congress included the following statement on behalf of public television organizations: Congress's clear intent was that "all Americans should be entitled to access to such alternative programming. It would be inconsistent with this intent to allow access to public television to turn on the market-directed behavior of cable operators." Source: Comments of APTS and PBS in MM Docket No. 88-138 at 8; CR VOL. I.Z, EXH. 140, CR 15292.

54. The record before Congress included the following comments by public television organizations: "[A]llowing any public television station to survive or fail based on the profit-motivated decisions of cable operators is inconsistent with the substantial government interest underlying

public television and jeopardizes this nation's 25-year, $1.5 billion investment in public television." Source: Comments of APTS and PBS in 88-138 at 28; CR VOL. I.Z, EXH. 140, CR 15312.

55. There was testimony by a public television representative before Congress that: "The 'must-carry' issue for public television is consistent with a broader public policy principle: the American public should have unimpeded access to public television services that exist to service the public interest and which have been supported by their tax dollars and direct contributions." Source: 1989 Senate Hearings at 93 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04103.

56. There was testimony before Congress that: "The American viewing public has a right of access to the public television services for which their tax dollars pay. . . . Without appropriate federal action, public television may fall short of the Congressional goal of assuring nationwide availability of public television service to every American." Source: 1989 Senate Hearings at 97 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04106-07.

II. EVIDENCE THAT PUBLIC TELEVISION STATIONS ARE ESPECIALLY VULNERABLE TO NON-CARRIAGE BY CABLE SYSTEMS

57. The record before Congress included the following description of cable practices: "According to a United Cable/Brown, Bortz and Coddington study, MSOs assign value to the program services that their systems carry by calculating both 'direct' and 'indirect' revenues from each service. . . . Because public television stations obviously contribute no direct revenues to cable systems, the value attributable to public service programming comes almost exclusively from the subjective inputs of viewer satisfaction and the opinion of cable management. By its very nature, programming specially targeted to reach unserved or underserved audiences—while serving a vital public

interest—may generate little 'indirect revenue.'" Source: Comments of APTS in MM Docket No. 89-600 at 18; CR VOL. I.T, EXH. 103, CR 12200.

58. The record before Congress indicated that under the econometric model produced by United Cable and Brown, Bortz, and Coddington, "public stations would be at a disadvantage because they produce no direct revenues to a cable system. Alternative programming may not be supported by the marketplace." Source: Comments of APTS and PBS in 88-138 at 5-6; CR VOL. I.Z, EXH. 180, CR 15289-90.

59. There was testimony before Congress that given the differing motivations of public television and cable operators, "there exists a substantial risk that many public television stations will not be carried by their local cable systems without rules requiring such carriage." Cooperation with cable operators has been successful, but it is not sufficient to protect carriage of all local public television services. Source: 1989 Senate Hearings at 107-108 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04117-18.

60. The record before Congress indicated that: "Public television stations cannot provide local ad spots for use by cable operators, cannot afford to pay for carriage, and are not, by virtue of their congressional mandate, designed to please mass audiences as a primary goal." Source: Comments of APTS and PBS ir 88-138 at 9; CR VOL. I.Z, EXH. 140, CR 15293.

61. There was testimony before Congress by a public television representative that: "[P]ublic TV is at a natural disadvantage compared with most other program services. Our stations are owned by universities, school systems and nonprofit community groups. We cannot offer an equity position to major cable operators, nor can we offer advertising time to cable systems as do many program services." Source: 1990 House Hearings at 89

(Testimony of George Miles); CR VOL. I.I, EXH. 16, CR 06256.

62. The record before Congress also included this statement: "The fact that cable operators must meet their financial objectives also suggests carriage and positioning decisions will be designed to benefit cable owned services." Source: 1989 Senate Hearings at 101 (Statement of David Drugger); CR VOL. I.F, EXH. 12, CR 04111.

63. The record before Congress included the following submission: "Public television provides programs that serve the needs of those unserved or undeserved by commercial television. Examples include children, the elderly, the handicapped, and ethnic and racial minorities. Cable operators are generally interested in offering a program lineup with the greater revenue potential. Thus, there is a substantial risk that many public television stations will not be carried by their local cable systems without must-carry rules." Source: Comments of APTS and PBS in MM Docket No. 88-138 at 7; CR VOL. I,Z, EXH. 140, CR 15291.

64. The record before Congress indicated that: "[p]ublic stations are especially vulnerable to non-carriage by cable systems. Unlike commercial stations, they do not cater to mass audiences. Nor do they offer programming, like specialty cable programmers, that promises to increase the cable operator's potential revenues." Source: Comments of State Public Broadcasting Networks in MM 85-349 at i; CR VOL. I.CC, EXH. 166, CR 16227.

65. There was testimony before Congress that: "There is already evidence that cable operators will structure their program delivery system to benefit cable program services. . . . A year ago TCI announced that it would be reducing channel capacity in certain systems, in part to raise ratings on cable services. . . . TCI's senior vice president for programming, admitted that TCI reduced the number of channels in a Pittsburgh system from 66 to 44 and stated 'it's not at all clear that more channels are

better' for TCI." Source: 1989 Senate Hearings at 101 (Testimony of David Brugger; CR VOL. I.F, EXH. 12, CR 04111.

66. The record before Congress included testiomny that analyzing the programming decision-making criteria of cable operators is "likely to be a far better indicator of future behavior than the few drops and shifts in the regulated or 'about-to-be-regulated' market. The major factor cable operators consider in deciding which channels to carry is their ability to generate revenue. . . . Public television services are unlikely to rate high on implicit or explicit criteria in this sort of decision-making." Source: 1989 Senate Hearings at 100 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04110.

67. Senator Gore stated that: "Public television stations are uniquely vulnerable to noncarriage. As we all know . . . cable systems are for-profit enterprises and naturally seek to carry programming which maximizes dollars and audience. Public television, in fulfilling its mandate to serve those audiences not served by commercial enterprises, carries much programming that cable systems find economically unattractive." Source: 138 Cong. Rec. S595 (Jan. 29, 1992) (Statement of then-Senator Al Gore); CR VOL. I.EE, EXH. 198, CR 17136.

68. On the basis of this and other evidence, a congressional committee with responsibility for must carry legislation concluded that: "Because cable operators are for-profit enterprises, they necessarily seek to provide customers with the package of programming and services that will maximize the operators' profits. As commercial enterprises, cable operators ordinarily lack strong incentive to carry programming that does not attrack [sic] sufficient dollars or audiences. Traditionally public television has provided precisely the type of programming commercial broadcasters and cable operators find economically unattractive." Source: 1992 House Report at 70; CR VOL. I.A, EXH. 4, CR 00449.

III. EVIDENCE THAT PUBLIC TELEVISION STATIONS HAD BEEN DROPPED OR REPOSITIONED IN THE ABSENCE OF MUST CARRY REGULATION.

A. Evidence Summarizing Public Television Stations' Experiences

69. The record before Congress included a report by the National League of Cities and U.S. Conference of Mayors which states that after judicial elimination of must-carry in mid-1980s, "[c]able operators began dropping broadcast stations, particularly public broadcasting and UHF stations." Source: 1990 House Hearings at 389; CR VOL. I.G, EXH. 13, CR 04586.

70. The record before Congress indicated that at one point in 1983 close to 100 public television stations found themselves dropped by cable operators. Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

71. The record before Congress included a report by the public broadcasters that by October 1985 "a few public television stations have already been dropped by cable systems, and other public television stations have been asked to pay for carriage by cable systems, sums they can ill afford." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking at 11 (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

72. The record before Congress included the results of a telephone survey conducted in 1987, in which APTS verified 74 instances in which cable systems had ceased carrying public television signals that were entitled to carriage under the pre-*Quincy* rules. "This includes 16 local public television stations that were dropped and restored, but does not include drops that NAPTS had not yet been able to verify." Source: Comments of APTS and PBS in 88-138 at 13-14; CR VOL. I.Z, EXH. 140, CR 15297-98.

73. The survey conducted by APTS in 1987 that was included in the Congressional Record revealed that of 74 verified drops of local public stations, about 80% were of UHF stations. UHF stations tend to have greater reception problems, making their viewers more dependent on cable carriage for their reception. "Of the 74 drops, more than half were of stations licensed to local school boards, colleges, or universities. These types of stations tend to carry more instructional and specifically educational programming than community licensees." Source: Comments of APTS and PBS in 88-138 at 14; CR VOL. I.Z, EXH. 140, CR 15298.

74. The record before Congress indicated that in 36 of 74 verified drops identified by APTS in a 1987 survey, "the replacement service was a programming service exclusive to cable, generally a so-called cable network such as Discovery or MTV." Source: Comments of APTS and PBS in 88-138 at 15; CR VOL. I.Z, EXH. 140, CR 15299.

75. The record before Congress indicated that, for 74 vertified drops identified by APTS in a 1987 survey, there was a loss of over 2,100,000 cable households that were unable to see a particular local public station on their cable system. Source: Comments of APTS and PBS in 88-138 at 15; CR VOL. I.Z, EXH. 140, CR 15299.

76. The record before Congress indicated that in 1987 APTS vertified 128 instances where cable systems had moved public television signals from the cable system channel location on which the signals had been carried prior to July 19, 1985. In addition, eight instances of channel shift threats were reported to NAPTS by local stations. Source: Comments of APTS and PBS in 88-138 at 22; CR VOL. I.Z, EXH. 140, CR 15306.

77. The record before Congress indicated that of the 128 verified local channel shifts identified by APTS in a 1987 survey, about 70% were UHF stations and about 30% were VHF stations. Sixty percent of those shifted

were stations licensed to local school boards, colleges, and universities. Source: Comments of AUPTS and PBS in 88-138 at 23; CR VOL. I.Z, EXH. 140, CR 15307.

78. The record before Congress included the following: The APTS telephone vertification survey conducted in 1987 indicated that about three million cable households were affected by channel shifts of local public television stations. Some viewers were not willing to relocate the station and obtain a converter for some or aii sets in the households. These presumably dropped out as viewers of and possible contributors to the affected station. Source: Comments of APTS and PBS in 88-138 at 23; CR VOL. I.Z, EXH. 140, CR 15307.

79. The record before Congress included the following: The APTS telephone vertification survey conducted in 1987 revealed that "[t]here are 17 public television stations that have come on the air since July 19, 1985. Informal interviews with these stations reveal that at least one has been shifted upward by a cable system, and three have reported problems obtaining or retaining carriage on local cable systems. One of these three, WMHX, Schenectady, New York, a primarily instructional station which came on the air on September 21, 1987, reports being dropped by Cablevision in Glen Falls, New York, a town within its Grade B contour." Source: Comments of APTS and PBS in 88-138 at 16; CR VOL. I.Z, EXH. 140, CR 15300.

80. There was testimony before Congress that by the spring of 1988 APTS had received 94 reports of cable systems that had dropped public TV stations, in which the service had not been restored. There was also testimony that APTS had had additional reports of drops, but the service had been restored. Source: 1988 House Hearings at 597 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02684.

81. There was testimony before Congress that by the spring of 1988 APTS had received 197 reports of channel shifting of public TV stations. The President of APTS testified: "That number shifts all the time because it is happening all the time. I just had a letter this week from one up in Wisconsin. The school system has lost service because the cable system channel shifted program of the Wisconsin State network." Source: 1988 House Hearings at 597 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02684.

82. The record before Congress included the "Cable System Broadcast Signal Carriage Survey Report" issued by the Federal Communications Commission in 1988 ("1988 FCC Survey"), which reported that, of 4,303 cable companies responding to FCC survey, there were 463 total incidents and 347 systems had dropped or denied carriage to a public television station that would have been entitled to carriage under the FCC's former must-carry rules. Source: FCC Cable System Broadcast Signal Carriage Report, MM Docket No. 90-4 at 10 (Sept. 1, 1988); CR VOL. I.P, EXH. 32, CR 10654.

83. The record before Congress included a report that, of 4,303 cable companies responding to the 1988 FCC survey, 432 systems repositioned public television stations, with 182 stations being repositioned and 541 total incidents. Source: *Id.* at 19, CR VOL. I.P, EXH. 32, CR 10663.

84. The record before Congress included a report that 88 of 237 public television stations responding to the 1988 FCC survey reported that they had been repositioned, with 417 total incidents. Source: *Id.* at 18, CR VOL. I.P, EXH. 32, CR 10662.

85. The record before Congress included a report that 80 of 237 public TV stations responding to the 1988 FCC survey reported that they had been dropped or denied carriage by a system that would have been required to carry them under the FCC's former must-carry rules, with 345 total incidents of drops or denial of carriage. Source: *Id.* at 9, CR VOL. I.P, EXH. 32, CR 10653.

86. There was testimony before Congress by an FCC Commissioner in 1988 that: "Public broadcasting was formed by *the government* to provide a distinctive, separate service. It is funded by the federal and, in many cases, state governments. Yet, the National Association of Public Television Stations informs me that over 100 stations have been dropped by cable systems. In addition, over 100 public stations have had their channels repositoned and some have been forced to share channel space with another program service. . . . Public stations feel and are desperately threatened by no must carry. They should not have to depend upon plea bargaining or the generosity of a local cable company to reach the audience they are officially licensed by the government to serve." Source: 1988 House Hearings at 307 (Statement of James Quello, FCC Commissioner) (citing letter from David Brugger to Senator Dingell (Mar. 29, 1988)); CR VOL. I.D, EXH. 9, CR 02393.

87. The record before Congress included the following comments made by APTS in early 1991: "Since the beginning of 1990, at least seven [public television] stations serving a total of 263,179 subscribers have been dropped fro mcable systems that previously carried their signals." Source: Comments of APTS in MM 90-4 at 10 n. 21 (Feb. 14, 1991); CR VOL. I.O, EXH. 43, CR 10117.

88. The record before Congress referred to a mail survey of 196 CPB licensees in 1991 (with 168 responding), in which 16 stations reported that they had been dropped since 1989 by cable systems with headends within 50 miles of the stations' main transmitters. The survey revealed an additional 11 drops of stations beyond 50 miles of the respective cable headend. "In several cases, the dropped stations either provided unique instructional or educational programming to the cable community or were programmed to avoid any substantial duplication with other public television services also available on the system. Moreover, in the majority of cases, local public television stations were replaced with cable-exclusive pro-

gram services." Source: Comments of APTS in MM 90-4 at 14-15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10801-02.

B. Evidence Regarding Drops and Shifts of Individual Public Television Stations

89. The record before Congress included the example of Iowa TCI, which moved Iowa Public Television (KIIN) from over-the-air channel 12 to channel 22 in four towns in Dubuque County, an area with hilly terrain. Following that action, "Iowa public television noticed that membership contributions in the area of the channel shift were down 75% as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable-ready sets. Many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second sets in their homes." Source: 1989 Senate Hearings at 102 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04112.

90. The record before Congress included evidence that KOCE, Huntington Beach, California, a public television station, was dropped from the cable system in Glendale, California in 1989. Turner Network Television ("TNT") and Prime Tickets were added by the cable system at that time. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

91. The record before Congress included evidence that WPBT, Miami, Florida, a public television station, was dropped from a number of local cable systems in October 1990. The station diverted personnel and financial resources to fight this action but was unable to restore service to all systems. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

92. The record before Congress included evidence that Connecticut Public Television (which attracts 18 percent

of its prime-time audience from Massachusetts) was deleted from the East Lawn Meadow, Massachusetts system in 1988 and 1989 when the system was rebuilt. Source: Comments of APTS in MM 90-4 at 16 (Sept. 25, 1991); CR VOL. I.P, EXH. 68, CR 10803.

93. The record before Congress included evidence that viewers in Hernando, Mississippi lost access to WKNO, Memphis, Tennessee, a public television station, on their local cable system in May 1991. The cable system replaced WKNO with Mississippi ETV, another public television service, despite the fact that Hernando is just 10 miles from Memphis and viewers had become accustomed to receiving WKNO's programming. When WKNO was dropped, the system also added E! (Entertainment Television), a cable-exclusive channel. Source: Comments of APTS in MM 90-4 at 15-16 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802-03.

94. The record before Congress included the following statement: KCSM-TV (San Mateo, CA), a public television station, "is licensed to the San Mateo County Community College district. KCSM was reportedly dropped by at least five cable systems within its Grade B contour, principally during 1986. According to KCSM, the most devastating of these drops was by Viacom Cable in San Francisco, serving 106,000 subscribers. Although Viacom Cable carries other public television stations, San Francisco cable househtolds were deprived of KCSM's unique mix of programming" (college level telecourses). KCSM "claims to offer more telecourses than any other station in the country. Without warning, Viacom dropped KCSM from its San Francisco cable system during the August enrollment period in the summer of 1986." Source: 1989 Senate Hearings at 100 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04110.

95. The record before Congress included evidence that WNIN, Evansville, Indiana, a public television station, was replaced with CNN on the cable system in Loogootee,

Indiana in February 1991." Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

96. The record before Congress included evidence that WJCT, Jacksonville, Florida, a public television station, was dropped by a cable system in Palm Coast, Florida and replaced with instructional programming from a college television station. The drop resulted in viewers losing service from a regional PBS affiliate, including specific programs directed at Palm Coast residents. WJCT launched an aggressive member campaign, and station representatives met with the local operator and the system's parent company to urge that service be restored. The station was off the system for six weeks before reinstatement. Source: Comments of APTS in MM 90-4 at 16 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10803.

97. The record before Congress included evidence that Georgia Public Television was replaced with TNT on a cable system in Peachtree City, Georgia in February 1990. The drop terminated service to 20,000 homes and in-school program services were cut off. Georgia Public Television devoted one staff member on a full-time basis to restoring carriage on the system, and several of the organization's executives joined in the campaign. After one month, the service was reinstated. Source: Comments of APTS in MM 90-4 at 16 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10803.

98. The record before Congress included evidence that "WIPB, Muncie, Indiana, a public television station, was dropped and replaced with the USA Network on the cable system in Bluffton, Indiana in April 1991." Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

99. The record before Congress included evidence relating to WLRN (Miami), a public television station licensed to a local school board. WLRN noticed actual

effects in its viewer levels measured by Arbitron ratings, which it felt resulted from cable carriage drops and shifts in its area. After Selkirk Cable in Ft. Lauderdale dropped WLRN around Christmas of 1986, a gradual decline was noted. Following a drop, subsequently restored, by Cablevision of Miami and a shift by Storer Cable of North Miami, the station's cumulative rating dropped to 176,000 in May 1987. As of 1988, the station's subscriber count was still 25,000 cable households less than before its cable carriage woes began. Prior to November 1986, the audience had been growing dramatically. WLRN generates over 800 hours per year of local programming. It has a regular schedule of programming in both Spanish and Creole and covers high school sports. Source: Comments of APTS and PBS in 88-138 at 20; CR VOL. I.Z, EXH. 140, CR 15304-05.

100. The record before Congress included evidence that WGBX (Boston), a public television station, was dropped by Heritage Cablevision in Providence County, Rhode Island. "This cable system, with 58,000 subscribers, apparently dropped WGEX under the mistaken impression that it was a mere repeat service for WGBH" (Boston). In fact, WGBX is programmed for a variety of specialized audiences" not served by WGBH. Source: Comments of APTS and PBS in 88-138 at 18-19; CR VOL. I.Z, EXH. 140, CR 15302-03.

101. The record before Congress included the following evidence concerning a public television station: "WLRN (Miami) last month learned that Miami Cablevision, a TCI system, had relocated WLRN away from its over-the-air channel (Channel 17) to Channel 26. Many of the 69,000 subscribers to Miami Cablevision 'just lost' WLRN. People lost track of where Channel 17 had gone and assumed it had gone off the air. WLRN feels that the channel shift jeopardized its future fund-raising support and viewer levels." Source: Comments of APTS and PBS in 88-138 at 24; CR VOL. I.Z, EXH. 140, CR 15308.

102. The record before Congress included the following evidence about a public television station: Nebraska ETV Network's KTNE was moved from Channel 8 to Channel 28 in Alliance, Nebraska, by the Alliance Community TV Company. The former channel number was subsequently restored, but in the meantime ETV Network received many complaints from subscribers and anticipates a decline in member contributions. Subscribers complain that the higher number required an additional converter box, which costs extra for second sets. One former member of KTNE returned his membership pledge form refusing to contribute until KTNE was moved to a channel with better reception. Other viewers complained that the necessity of the converter box required people with remote control units that only work up to Channel 13 to get up from their seats to change the channel, and that this posed a special problem for older citizens. Viewers also complained that the reception was much poorer. Source: Comments of APTS and PBS in 88-138 at 25-26; CR VOL. I.Z, EXH. 140, CR 15309-10.

103. The record before Congress included the following evidence about a public television station: "WCET (Cincinnati, OH) was dropped on April 1, 1988, by Viacom Cable in Dayton. WCET was replaced with the Discovery Channel. While Viacom continued to carry the Dayton public television station, WCET alone provides a number of instructional programs and also provides a number of local companion documentaries which supplement the Project Literacy outreach program, as well as classic movies on Saturday nights. PBS programming on the two stations is usually scheduled at different times." Source: Comments of APTS and PBS in 88-138 at 18; CR VOL. I.Z, EXH. 140, CR 15302.

104. The record before Congress included the following evidence about a public television station: "In 1986, KCSM (San Mateo, CA) was dropped by at least five cable systems within its Grade B contour. The most

devastating of these drops was by Viacom Cable in San Francisco, serving 106,000 subscribers . . . KCSM offers unique college level telecourses, and claims to offer more telecourses than any other station in the country." As a result of a drop without notice in the summer of 1986, KCSM estimates that it lost more than half of its paying telecourse enrollments. In addition, other people were deprived of this educational enrichment. Two representativ complaint letters from viewers were attached as part of the record before Congress. Source: Comments of APTS and PBS in BB-138 at 17; CR VOL. I.Z, EXH. 140, CR 15301.

105. The record before Congress indicated that viewers in Miami, Florida, gradually saw an erosion in access to WLRN-TV, Channel 17, a public television station licensed to a local school board in Miami. The record included the following testimony: "The cumulative Arbitron rating of WLRN declined steadily from 223,000 households in November 1986 to 197,000 in 1988, in part because of drops and shifts by Miami-area cable systems. Before November 1986, WLRN's audience had been steadily increasing. Loss of access to WLRN is particularly damaging given that the station leads the nation in hours of local programming produced, much of it targeted to minorities and women." Source: Comments of APTS in MM 90-4 at 11 (Feb. 14, 1991); CR VOL. I.O, EXH. 43, CR 10118.

106. The record before Congress included an application by WNYC, a public television station, for a Temporary Restraining Order prohibiting Manhattan Cable from shifting its channel. Source: Memorandum in Support of WNYC's Application for a Temporary Restraining Order, *TBS* v. *FCC*, CA No. 92-2247; CR VOL. I.N, EXH. 27, CR 09652.

107. The record before Congress included the following evidence about a public television station: "[T]he state of Virginia contracts with WNVT in Northern Virginia to provide instructional television for school use. One cable company dropped the station from its carriage, resulting in a loss of instructional television service in 14 schools within its coverage area. Pressure from the schools themselves convinced the cable operator to restore WNTV's signal." Source: 1989 Senate Hearings at 99 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04109.

108. The record before Congress included the following: WFYI, Indianapolis, Indiana, a public television station, was dropped from the cable system in New Castle, Indiana, in June 1991. The Encore programming service was added. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

109. The record before Congress included the following evidence about a public television station: "WKAR, East Lansing, Michigan was dropped from the system in Battle Creek in June 1991, thus depriving viewers of WKAR's coverage of the Michigan Legislature. WKAR is the only public television station in Michigan providing coverage of the State Capitol. The cable operator added Encore and rearranged the system to provide an 'extended basic tier.'" Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

110. The record before Congress included the following: The educational programming provided by WVUT, Vincennes, Indiana, a public television station, to the cable system in Jasper, Indiana was deleted in June 1991. Encore, Court TV and Prime Sports Network were added. Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

111. The record before Congress included the following: Four thousand viewers in Luling, Louisiana have been unable to receive college credit, GED and other literacy programs offered by Louisiana Public Broadcasting since Oct. 1990, when a local cable system dropped

LPB's services. WYES, New Orleans, still on the cable system, does not offer these educational services." Source: Comments of APTS in MM 90-4 at 15 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

112. The record before Congress included the following: "KCWC, Riverton, Wyoming, a public television station, conducted an unsuccessful campaign to obtain carriage on its local cable system. The operator chose to continue carrying a more distant public television station. Source: Comments of APTS in MM 90-4 at 21 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10808.

113. The record before Congress included a letter from the Director of the Ohio University Telecommunications Center informing the FCC that immediately after the D.C. Circuit's decision in *Quincy*, his public television station (WOUB-TV) had been dropped from a cable system located in its Grade B contour. He noted that the immediate impact of this drop was "to deny over 6,000 Ohio youngsters access to publicly funded instructional television programming and to cut off the remaining local public television program service from WOUB-TV which is the *only television station of any kind* operating in the region." He also noted "[w]hy is this being done? It is not due to a lack of channel capacity. It is not due to a lack of subscriber and community interest. It is because the operator realizes that he no longer has a regulatory obligation and has chosen to replace this tax supported public educational channel with an electronic billboard where he can tell advertising." Source: Letter from Ohio University Telecommunications Center to FCC, in MM Docket No. 85-349 (June 23, 1986); CR VOL. I.CC, EXH. 175, CR 16564.

114. The record before Congress also included a letter from WNYC, a public television station, informing the FCC that after the *Quincy* decision it had been dropped or realized a reduction in carriage hours on at least seven cable systems. This station noted: "Generally, a Pay-TV

service has replaced the channel WNYC-TV had been on prior to the 1985 ruling. In *most* cases where WNYC *shares* the channel position (which occurs on 16 cable systems), we are shared with a Pay-TV service. Clearly the cable operator is interested in securing income." Source: Materials submitted by WNYC in MM Docket No. 88-138 (July 8, 1988); CR VOL. I.Z, EXH. 134, CR 15245.

115. The record before Congress included evidence that WPNT, a public television station, was repositioned by Americable Associaties from channel 8 to cable channel 16. This move was made without notification to WPBT-2 and occurred during its membership drive. In order to access channel 16, subscribers without a "cable-ready" television set had to lease a converter box. Source: Letter from WPBT-2 (Miami) to J. Cadwuller, National Association of Broadcasters, May 6, 1988, in Comments of National Association of Broadcasters in MM Docket No. 88-138 at Appendix C (July 8, 1988); CR VOL. I.Y, EXH. 128, CR 14796.

116. The record before Congress included the following evidence concerning a public television station:

> The dilemma of new stations is aptly illustrated in Pittsburgh. Metropolitan Pittsburgh is presently involved in the restoration of Station WQEX(TV), Pittsburgh, Pennsylvania, which has been dark for over one year. Metropolitan Pittsburgh anticipates investing approximately $1 million in station renovations. . . . The station is being revived because there is a need in Pittsburgh for a new mix of instructional, informational and cultural programming. Metropolitan Pittsburgh anticipates at this time that little or none of the new station's fare will be duplicative of the existing Station WQED-TV programming. . . . Metropolitan Pittsburgh's ability to achieve its goals for Station WQEX(TV) depends largely on the availability of adequate cable carriage. Cable

> penetration in the Pittsburgh market is a high 50%. As such, the majority of the station's potential audience may never have a practical opportunity to view the station absent cable carriage. . . . Lack of viewers will translate directly into a lack of station members and membership dollars. Lack of funds could result in curtailment or termination of station operations, thereby depriving the public of a new and important source of programming.

Source: Joint Comments of Metropolitan Board of Education, *et al*, in MM Docket No. 85-349 (April 25, 1986); CR VOL. I.CC, EXH. 172, CR 16505-06.

C. Evidence That The Historical Drop/Shift Statistics Understated the Extent of the Problem For Public Television Stations

117. The record before Congress regarding public television included the following: "Data on drops and shifts is extremely difficult to assemble with accuracy. Many stations are unaware of which cable systems are carrying them, on which channels, and whether such systems are within their grade B contour. Cable lineups can change, making up-to-date information difficult to obtain. There is no requirement that cable systems notify dropped stations that they have been dropped." Source: Comments of APTS and PBS in 88-138 at 12-13; CR VOL. I.Z, EXH. 140, CR 15296-97.

118. The record before Congress regarding public television indicated that "[n]ot all stations reporting drops have the resources to devote to determining the precise amount of the viewing audience lost as the result of cable drops." Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

119. The record before Congress included the following statement by a public television representative: "Actual drops do not tell the whole story. Many stations expend

limited resources to keep cable services from dropping them or to get service restored." Source: 1991 House Hearings at 842 (Attachment to testimony of Henry Becton); CR VOL. I.J, EXH. 18, CR 07846.

120. The record before Congress included the following statement by public television organizations: "Adverse effects may take many years to become apparent. The experience of individual public television stations may be too brief to reveal the full story." Source: Comments of APTS and PBS in 88-138 at 10; CR VOL. I.Z, EXH. 140, CR 15294.

121. The record before Congress included the following statements by public television organizations: "The period 1985 to 1988 is not a fair test period for determining the behavior of cable operators in an unregulated market. Must-carry rules were under consideration, and cable operators were cautioned by NCTA to be on their best bhavior. In addition, must-carry rgulations created habits and patterns of behavior among cable operators. These are likely to disappear as market incentives are better understood." Source: Comments of APTS and PBS in 88-138 at 3; CR VOL. I.Z, EXH. 140, CR 15287-88.

122. The record before Congress included the following statement by a public television representative concerning cable carriage: "The situation is better today, but problems still occur and the threat remains—particularly as the market becomes more competitive for cable operators as they seek to maximize their profits." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

123. The record before Congress included the following testimony by a public television representative: "Public television believes that, as the must carry rules recede further into the past, cable operators will continue to drop, shift or exclude public television services at an accelerating rate. Both FCC and NCTA data show that

not all cable operators would choose to carry all local public television services. If they do carry them, they may relegate them to undesirable channel positions. Even carriage on a station's assigned channel could cause quality reception problems because of co-channel interference." Source: 1989 Senate Hearings at 102 (Testimony of David Brugger); CR VO L.I.F, EXH. 12, CR 04105.

124. The record before Congress included testimony by a public television representative that "drops to date cannot accurately predict future harm. Cable systems have been on their best behavior. Market incentives will prompt cable operators to drop cable television stations in an unregulated environment. Cable systems find public television programming to be "economically unattractive." Source: 1991 House Hearings at 843 (Attachment to Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07847.

IV. EVIDENCE THAT MUST-CARRY REQUIREMENTS HELP TO ENSURE THE "WIDESPREAD DISSEMINATION OF INFORMATION FROM A MULTIPLICITY OF SOURCES"

125. The record before Congress indicated that revenue is not the "bottom line" for public television stations. Comments by public television stations included the following statements: "Public television's goal is the delivery of a quality alternative programming service to all Americans. Diversity of programming and university of service are the real yardstick by which to measure public television's success. For every cable subscriber lost, there is a real, measurable loss." Source: Comments of APTS and PBS in 88-138 at 26; CR VOL. I.Z, EXH. 140, CR 15310.

126. The record before Congress included a letter from a cable subscriber who lost access to KCSM, a public television station, and who wrote that "my family

would be lost without it. I have taken many TV courses on it and continue to do so, also my sons that are now 27 years old. They work various shifts and some semesters it is the only way they can get in a college course. It is also so very good for poor folks that find this is the only way they can further any kind ofeducation at this time[.]" Letter from M. Anderson (viewer) to Western Cable TV, Nov. 19, 1986, in comments of NAPTS and PBS in MM Docket No. 88-138, (July 8, 1988); CR VOL. I.Z, EXH. 140, CR 15317.

127. The record before Congress also included a letter from another Sammons subscriber who complained about the loss of Japanese-language programming with the drop of WNYC. The letter stated: "My wife, who is Japanese, is very upset as are many of her friends." Source: Letter from McCallister (viewer) to Borrelli, August 25, 1956 in FCC 88-138; Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab S.

128. The record before Congress also included a letter from a cable subscriber whose public television station was repositioned to a channel requiring a converter box. The subscriber wrote that her children were no longer able to watch Sesame Street. Letter from N. Price (viewer) to Allaince Cable TV, in comments of NAPTS and PBS in MM Docket No. 88-138 (July 8, 1988), Attachment 8; CR VOL. I.Z, EXH. 140, CR 15322.

129. The record before Congress indicated that WOUB-TV was dropped because the cable operator wanted only one public television station, even though the two stations carried the same programming only 1% of the time. Source: Letter from Ohio University Telecommunications Center to FCC, in MM Docket No. 85-349 (June 23, 1986); CR VOL. I.CC, EXH. 175, CR 16563.

130. In connection with consideration of must-carry legislation, Senator Adams stated that: "The must-carry

provision is essential to protect public television and the rights of small independent commercial stations. Without this, these stations could be swept off cable or be saddled with obscure channel positions on the cable dial. The must-carry provision also guarantees the actual distribution of public television and small independent commercial TV stations." Source: 138 Cong. Rec. S592 (Jan. 29, 1992); CR VOL. I.EE, EXH. 196, CR 17132.

131. The record before Congress included the following statement by public television organizations: "Individual drops and shifts can cause major harm, even if not part of nationwide trends. The harm caused by loss of even one public statio nto one cable system's subscribers cannot be understated." Source: Comments of APTS and PBS in 88-138 at 10; CR VOL. I.Z, EXH. 140, CR 15294.

132. The record before Congress included the following statements by public television organizations: "[E]ven if a public television service is not dropped, it may be subject to pressures to compromise its service objectives—that is, to shift toward programming with a broader appeal in order to enhance its prospects for cable carriage." Source: Comments of APTS in MM 89-600 at 3-4; CR VOL. I.T, EXH. 103, CR 12185-86.

133. The record before Congress indicated that: "Cable carriage decisions have resulted in the loss of valuable educational services. Each instance of a cable system's termination of carriage of a local public television station causes harm, not only to the schools and cabl esubscribers, but also, because of viewer and revenue loss to the public television station dropped, to all of the other viewers of the public station." Source: 1989 Senate Hearings at 99 (Statement of David Brugger); CR OL. I.F, EXH. 12, CR 04109.

134. The following statement by a public television representative was included in the record before Con-

gress' "[W]ithout mandatory carriage, there is no guarantee that cable systems will carry even one local PTV station. Instead, if they decide to carry any PTV station at all, they could opt for a distant, larger, more powerful PTV station. Even if they carry one local PTV station, they will likely not carry a second or a third local PTV station, on the assumption that only the programming fed by PBS needs to be carried. This assumption ignores the plethora of educational programming geared to the local community that is provided by PTV stations throughout the day; as well as the wealth of regional programming not distributed through PBS. Such programming greatly not distributed through PBS. Such programming differs greatly from station to station within the local market. Thus, without mandatory cable carriage, there will be a severe reduction in the diversity of programming available through PTV stations to the American people." Source: 1988 House Hearings at 602 (Letter from Donald Ledwig to Rep. Markey (Apr. 8, 1988)); CR VOL. I.D, EXH. 9, CR 02689.

V. EVIDENCE THAT MUST-CARRY HELPS TO PRESERVE PUBLIC TELEVISION STATIONS' ABILITY TO ATTRACT AND MAINTAIN FINANCIAL SUPPORT

135. Congress was aware that "public television stations receive 21 percent, or more than $263 million, of their annual funding from private individual contributions, the largest single source of funds for public programming. . . . Viewers have invested $11 billion in public television since 1972. When a local public television station disappears from a cable system, it loses its ability to reach out to viewers on the system and to attract contributions that underwrite a large part of the station's service to the community. Local viewers, in turn, lose access to the unique public television programming that their contributions and volunteer efforts support." Source:

Comments of APTS in MM 90-4 at 17-18 (Sept. 25, 1991) (internal citations omitted); CR VOL. I.P, EXH. 64, CR 10804-05.

136. There was testimony before Congress by an FCC Commissioner that: "The most significant problem confronting public television today is adequate funding. As the former Chairman of the Temporary Commission on Alternative Financing for Public Telecommunications, I can attest to the difficulties public stations have in securing non-government funds. The dropping of a public television station can have enormous impact on a station's revenues. . . . Given current uncertainties surrounding the levels of government funding for public broadcasting, declines in revenues from being dropped by cable operators can be devastating. Moreover, some advertiser supported cable networks compete with public television for programming. Increased cable revenues combined with decreases in funding place public television in a form of double jeopardy." Source: 1988 House Hearings at 323-24 (Statement of James Quello); CR VOL. I.D, EXH. 9, CR 02409-2410.

137. The record before Congress indicated that: "[T]he financial losses resulting from cable drops ultimately disadvantage cable and over-the-air audiences alike. Clearly, membership contirbutions from cable subscribers are an important component of a station's overall support. When those dollars are lost because of non-carriage, a station's ability to continue serving the entire viewership is diminished. If enough losses occur, a station can easily slip below the level of viability required to continue providing service to its entire audience. The consequence is a significant loss of diversity of programming for all viewers. Under a telecommunications policy which seeks to 'assure that cable communications provide the widest possible diversity of information sources and services to the public,' this loss of diversity is plainly antithetical to the federal interest." Source: Comments of ATS in

MM 90-4 at 18-19 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR. 10805-06.

138. The record before Congress indicated with respect to public television that: "The loss of viewers inherent in a loss or degradation of cable carriage often means a loss of membership contributions. These are a significant percent of public television support. Even though revenues may not be the bottom line, financial stability is essential to public television's ability to fulfill its mission to reach the largest number of Americans possible with quality alternative programming." Source: Comments of APTS and PBS in 88-138 at 27; CR VOL. I.Z, EXH. 140, CR 15311.

139. The record before Congress included the following: "Each instance of a cable system's termination of carriage of a local public television station causes harm not only to the cable subscribers, but also, because of viewer and revenue loss to the public television station dropped, to all of the other viewers of the public television stations." Source: Comments of APTS and PBS in 88-138 at 16-17; CR VOL. I.Z, EXH. 140, CR 15300-01.

140. The record before Congress indicated that: "Non-carriage results in reduced viability of public television stations because "[l]oss of cable viewers means loss of private contributions, the largest single source of funds for public programming. Without key financial support from cable households, public television stations can easily slip below the level of viability required to serve its broadcast audiences." Source: 1991 House Hearings at 843 (Attachment to Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07847.

141. The record before Congress contained the following statement by a public television representative: "Every drop by a cable system of a public television station is harmful to the public television station. To illustrate this point we have enclosed a sample of letters from cable

subscribers to operators complaining about cable drops or to public stations discontinuing financial support because they no longer receive the station. This mail shows Americans angered by their inability to view the very public television that their tax dollars help to pay for. It also shows public stations losing desperately-needed public contributions." Source: 1988 House Hearings at 323 (Statement of Commissioner James Quello, quoting Senator Dingell. (Mark 29, 1988)); CR VOL. I.D, EXH. 9, CR 02409.

142. There was testimony before Congress with respect to public television that "[w]here a station has dedicated a great deal of time and effort to building station identification on a particular cable channel, any move can be devastating, even if the shift is to the (usually higher) over-the-air channel number." Source: 1989 Senate Hearings at 102 (Statement of David Brugger); CR VOL. I.F, EXH. 12, CR 04112.

143. The record before Congress included evidence that WKNO, a public television station, lost members after it was dropped from the cable system in Hernando, Mississippi. Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

144. The record before Congress also included evidence that WNIN, a public television station, reported a membership loss after it was dropped from the cable system in Loogootee, Indiana. Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10802.

145. The record before Congress also included evidence that WIPB, a public television station, suffered a membership loss after it was dropped by the cable system in Bluffton, Indiana. Source: Comments of APTS in MM 90-4 at 18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

146. The record before Congress included the following: "TCI decided to move Iowa public television's KIIN from its over-the-air Channel 12 to Channel 22 in four towns in Dubuque County. Cable carriage is particularly important in [this] county because of its hilly topography. After the shift, Iowa public television noticed that membership pledge increases from the area of the channel shift were down 75% as compared to the rest of the state. The channel shift meant that viewers needed a converter for non-cable-ready sets. Many subscribers apparently did not obtain the converters, did not know how to install them, or did not acquire them for second sets in their home. Thus it is likely that a decline in viewership affected membership contirbutions from the area." Source: Comments of APTS and PBS in 88-138 at 24-25; CR VOL. I.Z, EXH. 140, CR 15308-09.

147. The record before Congress included the following evidence about a public television station: "In San Mateo, California, KCSM-TV, Channel 60, a university licensee, was dropped by at least five cable systems within its Grade B contour. The effect of being dropped from even just one of these systems—the one serving San Francisco—was for 106,000 cable subscribers to lose access to KCSM. KCSM primarily offers college-level telecourses and was dropped in San Francisco during the height of its 1986 fall enrollment period. As a result, KCSM estimates that it lost more than half of its paying enrollment." Source: Comments of APTS in MM 90-4 at 11 (Feb. 14, 1991); CR OL. I.Z, EXH. 140, CR 15301.

148. The record before Congress also included the following: "WKAR, a public television station, reported a loss of 592 contributing members in the Battle Creek area when the station was dropped from the local cable system." Source: Comments of APTS in MM 90-4 at

18 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10805.

149. The record before Congress included a 1991 APTS survey that revealed that many public television stations annually devoted thousands of dollars and hundreds of staff hours to promoting carriage among local cable operators to guard against deletion of their signals. The record also indicated that many stations monitored local systems to guard against drops undertaken without advance notice from the cable operator. Public television organizations advised Congress that: "These efforts, which would largely be unnecessary in a must-carry environment, drain away funds that stations otherwise could invest in programming and other service to local viewers." Source: Comments of APTS in MM 90-4 at 6 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10793.

150. The results of the 1991 APTS survey of public television stations were reported to Congress as follows: "Among the 93 stations that provided cost estimates for their 'cable relations' efforts, spending averaged $4,800 annually and ranged as high as $30,000. Approximately 20 stations reported expenditures of $8,000 or more annually to remain in contact with their local cable systems, and the staff members dedicated to these efforts spent as much as 30 to 50 percent of their time on cable issues." Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10807.

151. The 1991 APTS survey also reported that local public television stations "devote considerable time, personnel and money to cable monitoring and marketing. For example, of the 151 licensees that have specific marketing schemes:

89 percent contact cable operators directly

70 percent promote cable viewing through program guides

22 percent use newsletters to reach members and viewer awareness

32 percent use other mechanisms."

Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991). CR VOL. I.P, EXH. 64, CR 10807.

152. The 1991 APTS survey of public television stations concluded that: "[A] substantial majority of all stations channel considerable time, personnel, money and effort into cable carriage campaigns on a continuing basis. Every dollar invested in these efforts is a dollar unavailable for meaningful service to public television viewers in programming, follow-up educational efforts and local production." Source: Comments of APTS in MM 90-4 at 21 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10808.

153. The record before Congress indicated that "seven out of ten stations responding to the 1991 APTS survey of CPB licensees had assigned at least one staff member to monitoring and promoting cable carriage, and over half of the respondents spend thousands of dollars annually marketing their services to cable operators. These efforts divert precious financial resources from the stations' programming and community outreach and represent funds that are unavailable to support programming acquisition and production." Source: Comments of ATS in MM 90-4 at 19 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10806.

154. The record before Congress included a submission from Wyoming Public Television reporting that it spent nearly a quarter of a million dollars to upgrade its equipment in an unsuccessful attempt to persuade Casper Cable Company to carry its signal in Casper, Wyoming. Source: Comments of Wyoming Public TV, in MM Docket 90-4 at 2 (Sept. 26, 1991); CR VOL. I.Q, EXH. 72, CR 11054.

155. The record before Congress included the following: WUFT, Gainesville, Florida, a public television station, incurred substantial costs in 1991 in an extensive campaign to restore carriage on local cable systems that dropped the station's signal. Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, 10807.

156. The record before Congress included the following: KCET, Los Angeles, a public television station, provides press releases, preview tapes, outreach and promotional materials to cable systems and is an active member of the regional cable association. Source: Comments of APTS in MM 90-4 at 20 (Sept. 25, 1991); CR VOL. I,P, EXH. 65, CR 10807.

157. The record before Congress included the following: KOCE, Huntington Beach, California, a public television station, has uupgraded its transmitter, produced promotional spots to inform viewers where to find the stations on the cable system and purchased special Arbitron cable reports. Source: Comments of APTS in MM 90-4 at 20-21 (Sept. 25, 1991); CR VOL. I.P, EXH. 64, CR 10807-08.

158. The record before Congress indicated that: "Local cable carriage has profound ramifications on a station's ability to attract and maintain financial support. Therefore, the business planning and fundraising of public television stations cannot be dependent solely on the goodwill of cable operators. Legally-assured cable carriage is especially critical in a market where cable operations are bought and sold frequently. Scarce dollars and time spent convincing a cable manager to carry a public television station will be wasted if the cable operator's management changes. Because of the substantial government interest underlying, as well as the government's 25-year, $1.5 billion investment in public television, public TV cannot be left to survive or die based on the business decisions of commercially-motivated cable operators." Source: Comments of APTS and PBS in 88-138 at 9; CR VOL. I.Z, EXH. 140, CR 15293-94.

159 There was testimony before Congress by a public television representative that: "Loss of carriage can start a whole chain reaction. If we lose viewers, we lose the viewers' contributions, and that is now the largest single source of funds for public television. If they do not have those funds, they cannot meet the matching funds that we need for other Federal and non-Federal funders. . . . These are difficult issues for public TV because our return on investment is the public interest, paid for, to a great extent, with tax dollars." Source: 1988 House Hearings at 522 (Testimony of David Brugger); CR VOL. I.D, EXH. 9, CR 02611.

160 The record before Congress included the following: "[E]ach public television station that loses cable carriage suffers a loss in audience and viewer contributions, which reduces the ability of that station to acquire programming to service its community. This loss of carriage of individual stations exerts a cumulative drag on the ability of the stations to finance production of new and innovative programming, because public television funds many of its programs collectively through such mechanisms as the Station Program Cooperative and the Program Challenge Fund. Thus, carriage loss of each individual station harms the overall public television system." Source: 1988 House Hearings at 602 (Letter from Donald Ledwig to Congressman Markey (Apr. 8, 1988)); CR VOL. I.D, EXH. 9, CR 02689.

161. The record before Congress indicated that: "[B]ecause of the interdependence of public television program producers and stations—with the producers relying on financial support from the stations and the stations, in turn, relying on program producers for continued quality programming—a diminution in the economic strength of

individual stations affects the overall program quality and diversity that all stations offer. Thus, any significant loss in cable carriage can, and will, have a substantial impact not only on individual stations, but also on the public television system as a whole." Source: Joint Petition of CPB, APTS, and PBS for Rulemaking (Oct. 15, 1985); Appendix to Memorandum of Points and Authorities, Vol. 5 at Tab R.

162. The record before Congress included the following: "The Public Broadcasting Act authorizes financing for public broadcasting stations on the basis of a matching formula of nonfederal to federal financing. Today, public television stations exceed their matching requirement to receive the full amount of funds authorized by the Act. However, if enough stations suffered a substantial reduction in their contributions as a result of loss of carriage on their local cable systems, the overall amount of federal financing intended by Congress to be available to public broadcasting could be reduced." Source: 1988 House Hearings at 602 (Letter from Donald Ledwig to Congressman Markey (Apr. 8, 1988)); CR VOL. I.D, EXH. 9, CR 02689.

163. The FCC informed Congress that: "The continued viability of noncommercial television (which by its very nature is affected by market forces in different ways than are commercial broadcasting) may depend on targeted mandatory carriage obligations for multichannel video providers." Source: FCC Report to Congress in Docket No. 89-600 (7/26/90); CR VOL. I.L, EXH. 23, CR 08973.

164. During consideration of must-carry provisions, Senator Gore stated that: "The impact of noncarriage is particularly devastating to public television stations. The largest single source of funding for public television is from private individual contributions. When a local cable system drops a public television station, its contributions from its cable viewers are in jeopardy. Without the key

financial support from its cable audience, a public television station can easily slip below the level of viability required to continue to provide service to its broadcast audience. Stations not only lose audience and contributors, they also lose paying enrollees to their college telecourses, and elementary and high school students are deprived of their instructional programming. I was amazed to learn that sixty-nine percent of the public television stations that provide instructional programming to schools distribute that programming via cable." Source: 138 Cong. Rec. S595 (Jan. 29, 1992) (Statement of then Senator Gore); CR VOL. I.EE, EXH. 198, CR 17136.

VI. EVIDENCE THAT THE MUST-CARRY PROVISION FOR PUBLIC TELEVISION STATIONS IS NARROWLY TAILORED

A. Evidence that Over-the-Air Broadcasting Is Not An Acceptable Alternative

165. The record before Congress indicated that the most important component in assuring adequate UHF reception is the adequacy of the receiving antenna systems, and that subscribers to cable systems are unlikely to incur the substantial costs associated with purchasing their own quality receiving systems given that they often subscribe to cable service for just such quality reception. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 15; CR VOL. I.CC, EXH. 166, CR 16243.

166. The record before Congress included evidence that apartment and condominium dwellers rarely have an opportunity even to install an outdoor antenna. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 15 n.18; CR VOL. I.CC, EXH. 166, CR 16243.

167. The record before Congress also included evidence of the complexity of manually orchestrating the

cable converter (which must be turned off or disconnected), an A/B switch, the TV tuner adjustment, plus any necessary redirectionalizing of the antenna. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 16 n.19; CR VOL. I.CC, EXH. 166, CR 16243.

168. The following appears in the record before Congress: "[P]ublic station transmitters are [frequently] located on state-owned property" which is more economical but may offer less powerful coverage than transmit sites atop mountains or tall structures. Source: Comments of State Public Broadcasting Networks in MM 85-349 at 14; CR VOL. I.CC, EXH. 166, CR 16242.

169. The following also appears in the record before Congress: "In other instances, the station transmit sites are engineered to serve the largest geographical area, frequently resutling in relatively weaker signals over the large population areas." Source: Comments of State Public Broadcasting Networks in MM 85-349 at 14; CR VOL. I.CC, EXH. 166, CR 16242.

170. The record before Congress indicated that in light of public television's dependence on UHF channels, "the availability of the A/B switch will not . . . provide a viable alternative ot cable carriage since homes equipped with A/B switches may not be able to receive an adequate over-the-air signal even though they are within the station's service contour. Moreover, as the [FCC] itself concluded, the most important component in assuring adequate UHF reception is the adequacy of the receiving antenna systems, and subscribers to cable systems are unlikely to incur the substantial costs associated with purchasing their own quality receiving systems given that they often subscribe to cable service for just such quality reception." Source: Joint Petition for CPB, APTS, and PBS for Rulemaking at —— (Oct. 15, 1985) (citing *Report and Order, in Docket No. 78-391*, 90 F.C.C. 2d 1121, 1124-25 (1982)).

171. The record before Congress indicated that: "Because of the 'UHF handicap,' the availability of an A/B switch permitting viewers to toggle between cable and over-the-air broadcasting cannot diminish the substantial harm that the public suffers when distinctive public television services are excluded from cable systems." Source: Comments of APTS in MM 89-600 at 22; CR VOL. I.T, EXH. 103, CR 12204.

172. Congress was aware of evidence that "fewer than 1 percent of cable subscribers have an outdoor antenna and an A/B switch." 1992 House Report at 70 (citing 1985 study submitted by National Association of Broadcasters); CR VOL. I.A, EXH. 4, CR 00449.

173. On the basis of this and other evidence, Congress concluded that: Various technical factors considered by the Committee convince it that continued over-the-air broadcasting by public television stations is not an answer to this problem. "In many places, due to terrain problems and buildings, high quality over-the-air signals cannot be received. Two-thirds of public television stations operate on the UHF band, which is far more vulnerable to interference from the earth's contours and atmospheric disturbances than the predominantly commercial VHF band." If cable retransmission of these signals, which has counteracted this UHF handicap, were unavailable, these public television stations would be severely disadvantaged. "Even where there is no UHF or terrain handicap, cable subscribers must have both an input selector switch and an exterior antenna in order to receive high-quality television signals over the air. Evidence shows that fewer than 1 percent of cable subscribers have an outdoor antenna and an A/B switch [citing 1985 ELRA study submitted by NAB]. Both the cable and broadcast industries, in filings before the Commission and Congress, have stated that the A/B switch is not the solution. The Committee finds, based on this and other evidence before it, that the technical and economic complexities involved with the A/B

switch make it an unworkable solution. Under these circumstances, the Committee believes that there is a very significant danger that millions of Americans that now subscribe to cable will be cut off from the services of this local public institution which they support." Source: 1992 House Report at 70-71; CR VOL. I.A, EXH. 4, CR 00449-50.

B. Evidence About PEG Channels

174. Congress was aware that there was unused capacity on public, educational and governmental ("PEG") channels. Source: 138 Cong. Rec. H6554 (July 23, 1992) (Statement of Rep. McMillen); CR VOL. I.EE, EXH. 195, CR 17128.

C. Evidence Concerning The 1990 NCTA-APTS Agreement

175. Congress was aware of the 1990 must-carry agreement between APTS (then known as "NAPTS") and the National Cable Television Association ("NCTA") and the fact that this agreement was reflected in H.R. 4415. Source: 1990 House Hearings at 89 (Statement of George Miles); CR VOL. I.I, EXH. 16, CR 06255.

176. The record before Congress included the testimony of James Mooney, the President and Chief Executive Officer of the NCTA, who described the agreement as "a pure and simple must carry rule" and "a workable compromise guaranteeing that public television will remain an integral part of cable's basic programming package." Source: 1990 House Hearings at 151, CR VOL. I.I, EXH. 16, CR 06318; *see also* 1990 Senate Hearings at 70, CR VOL. I.H, EXH. 15, CR 05644.

177. The record before Congress included testimony by a public television representative that the 1990 NCTA/APTS agreement "accomplishes its intent without placing an undue financial burden on the cable industry. Based

on our initial analysis, only three percent of the nation's cable system—largely limited to seven television markets—would be required to carry more than two stations." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

178. Congressman Rinaldo described the 1990 NCTA-APTS agreements as one that "is fair to both sides and benefits both sides. Most of all it benefits the public, who will be assured of receiving the public television which their tax dollars support." Source: 1990 House Hearings at 87; CR VOL. I.I, EXH. 16, CR 06254.

179. The record before Congress included testimony that, with respect to must carry for public television stations, "there appears to be no conflict between public television's position and that of the cable industry." Source: 1991 House Hearings at 835 (Statement of Henry Becton); CR VOL. I.J, EXH. 18, CR 07839.

180. The record before Congress included no opposition to the 1990 NCTA-APTS agreement either in Congress or before the FCC. Source: Reply comments to APTS, MM Docket No. 90-4 at 2, 3, n.6 (Oct. 25, 1991); CR VOL. I.Q, EXH. 79, CR 11318-19.

D. Evidence on the Overall Impact of Must-Carry on Cable

181. On the basis of this and other evidence, Congress concluded that "[t]he burden imposed on the cable industry by the legislation is minimal. Data compiled by the Association for Public Broadcasting indicate that mandatory carriage of all qualified local public television stations whose programming is substantially unduplicated would have the following effect on the cable industry: 84 percent of the nation's cable systems would be required to carry one public television service; 13 percent could be required to carry two public television stations; and 3 percent of all systems could be required to carry more

than two services. All of these systems are found in seven television markets: New York, Los Angeles, Chicago, San Francisco, Boston, Washington (D.C.), and New Orleans. . . . [T]o ensure that the impact of the legislation is limited (in terms of the public television stations to be added to cable systems), the legislation has not adopted such a blanket 'must carry' requirement. Instead, it requires that cable systems carry only qualified local public television stations that request carriage. In addition, the legislation minimizes the effect on small- and medium-sized cable systems by imposing caps on the number of public television stations that must be carried by systems with limited channel capacity. Furthermore, the legislation does not require systems of more than 26 channels to carry substantially duplicated public television services if such a system otherwise would have to carry more than three public stations." Source: 1992 House Report at 71; CR VOL. I.A, EXH. 4, CR 00450.

[Signature Block Omitted]

Dated: May 26, 1995

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' JOINT SUBMISSION OF ADDITIONAL EVIDENCE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

DOCUMENTARY EVIDENCE

VOLUME VII.J

* * * *

Dated: May 26, 1995

* * * *

[Exhibit 217]

FEBRUARY INDUSTRY ISSUES (2)

Systems Continue to Benefit From Strong Local Ad Sales Revenues

Despite a weak economy it appears local ad sales revenues and spot costs, continue to soar. With reregulation and mature sub growth there is little doubt that LAS will become an increasingly important contribution to systems cash flow. TCI systems, for example, have been budgeted to increase sales by 25% over 1991.

More A&E Insertions Planned In Major Interconnects

To benefit from regional advertisers it appears that there are increasing investments being made in interconnects.

A&E has gained acceptance on the interconnect level with insertion planned in major markets including Atlanta, Pittsburgh, Miami, New York and Tampa Bay by the end of the year. Substantial gains are also being made with third party rep firms.

Systems are having less success selling Family Channel and MTV. Joy reports that three systems have switched out Family Channel. With these nets vulnerable, it could open up more new insertion opportunities for A&E. "Evening At The Improv" and other comedy programming could be sold to advertisers looking for a younger, MTV demo.

Now that many systems are inserting on A&E, the biggest challenge appears to be increasing its contribution to local ad sales revenues. Several systems reported that less than 2% of revenues come from specific purchases on A&E. The UA/TCI Interconnect in Southern California (240,000 subs) generally sells A&E as a bonus in its packages. This could indicate a need for continuing LAS workshops

such as last year's Triple Demo Workshops with ESPN and Lifetime.

The Western Region will be conducting a workshop at the Jones Intercable National Local Ad Sales Managers Meeting in Denver, March 11, 12 and 13th. Del added that they have compiled extensive LAS research on Jones systems nationally.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

TIME WARNER ENTERTAINMENT COMPANY, L.P.'S AFFIDAVITS IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' SUMMARY JUDGMENT MOTIONS AND IN FURTHER SUPPORT OF ITS SUMMARY JUDGMENT MOTION

* * * *

June 16, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SUPPLEMENTAL AFFIDAVIT OF CHARLES W. ELLIS

STATE OF CONNECTICUT)
) ss.:
COUNTY OF FAIRFIELD)

CHARLES W. ELLIS, being duly sworn, deposes and states as follows:

1. I am Executive Vice President of Time Warner Cable, a division of Time Warner Entertainment Company, L.P., a position I have held since September 1986. I submit this affidavit to supplement the affidavit I previously submitted on May 25, 1995, which described the injury to Time Warner from the must-carry provisions of the 1992 Cable Act.

2. The must-carry provisions have injured Time Warner systems by requiring them to continue carrying broadcast stations that they previously had chosen to carry but may have dropped subsequently for various reasons. Those reasons include the fact that broadcast stations are continually changing their programming, and such changes can lead to carriage of duplicative or less desirable programming on a particular Time Warner system.

3. Although Time Warner systems constantly strive to use all available channels, there are a variety of reasons why a particular cable system may have unused channel capacity, including the following: the operator may be reserving the channel for a station with which it is in the process of negotiating an acceptable contract; the

operator may be constrained by internal economic considerations; the operator may be awaiting regulatory approvals; or the operator may be waiting for other changes to its channel lineup in order to reduce the costs of making multiple lineup changes. If possible, a Time Warner system will not allow a channel to remain idle, but will fill that channel with programming chosen after considering a variety of internal and external factors.

4. The impact of the must-carry regulations on Time Warner has been substantial. On Time Warner systems, must-carry stations occupy approximately 10% of total channel capacity. At the time the must-carry regulations were enacted in 1992, Time Warner had no unused channels on which to place additional programming on 88.42% of its cable systems. In 1994, Time Warner had no unused capacity on 92.70% of its systems. 122 or 40.8% of Time Warner systems added, dropped and/or repositioned programming in order to accommodate must-carry demands. 56 or 18.7% of Time Warner systems dropped programming in order to accommodate must-carry demands. 112 or 37.4% of Time Warner systems added one or more broadcast stations pursuant to must-carry. Of the 74 program services dropped because of must-carry demands, 35 or 47.2% of those were television broadcast stations. 25 broadcast stations have demanded carriage or are anticipated to demand carriage pursuant to must-carry in the near future on 33 Time Warner systems. An average of 23.73% of capacity on Time Warner's systems is occupied by broadcast stations. On 59 or 19.06% of Time Warner systems, over 30% of capacity is occupied by broadcast stations. Fifteen Time Warner systems have 20% or more of their channel capacity occupied by must-carry stations. Fifteen Time Warner systems have had to add four or more must-carry stations to their lineups.

5. As part of the editorial discretion that they exercise on a regular basis, cable operators often choose to drop

or not carry cable programming stations in order to carry other cable programmers and/or broadcast stations.

6. Time Warner systems do not choose cable programmers in which Time Warner owns an equity interest over any other programming because of the existence of that equity interest. Because Time Warner's revenues are derived mostly from cable subscribers, Time Warner will choose that programming which will attract and maintain subscribers. It is not profitable for us to sacrifice viewer satisfaction for the marginal gains we might derive from carrying a cable network in which we have an equity interest.

7. In virtually every instance in which a broadcast station is affiliated with the FOX television network, Time Warner will carry that broadcast station on its systems.

8. The must-carry regulations have resulted in the permanent physical occupation of Time Warner's private property, which precludes Time Warner from using such property for any of its own purposes or from excluding broadcast stations from that property. Broadcast stations carried pursuant to must-carry occupy actual physical space on Time Warner's systems by utilizing channel capacity on particular systems, using a portion of those systems' cable bandwidth for the transmission of their programming, and otherwise using the equipment and technology of a cable system to provide carriage of such broadcast stations. This physical occupation is severe and substantial, as must-carry broadcast stations occupy approximately 10% of the channels available on Time Warner's systems. In conjunction with other carriage mandates, such as PEG and leased access requirements (47 U.S.C. §§ 531, 532), the Government seizes substantial portions of Time Warner's property for use by others.

9. Furthermore, the must-carry regulations substantially interfere with Time Warner's reasonable investment

expectations. Prior to the enactment of must-carry, Time Warner invested billions of dollars to develop its cable systems with the expectation that it would retain control over that property. Time Warner incurred significant expense to expand channel capacity in order to expand programming of its choosing and create more attractive line-ups and programming packages. Instead, the must-carry regulations require Time Warner to yield control of approximately 10% of its available channels for the benefit of others without compensation. Prior incarnations of must-carry rules adopted by the FCC had been invalidated twice by the District of Columbia Circuit; it therefore could not have been expected that the Government lawfully could impose on cable operators any mandate to carry local broadcast stations on their private cable channels.

* * * *

June 13, 1995

/s/ Charles W. Ellis
CHARLES W. ELLIS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

MEMORANDUM OF DISCOVERY COMMUNICATIONS, INC. IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SUPPLEMENTAL AFFIDAVIT OF DAVID J. LARGE

I, David J. Large, declare on the basis of my personal knowledge and my expertise in the area of telecommunications and the cable television industry, the following:

1. My experience is outlined in paragraphs 1-6 of my affidavit filed on May 26, 1995, in this proceeding and the curruculum vitae attached as Appendix I to that affidavit.

2. I have reviewed the following documents for the purpose of preparing this affidavit:

a. The Declaration of Eldon J. Haakinson, filed on May 26, 1995. [DAE II.B Exh. 7].

b. The Expert Report of Eldon J. Haakinson, filed on April 21, 1995. [Attached at Exhibit 1 to this affidavit].

c. The Transcript of the Deposition of Eldon J. Haakinson, taken on May 4, 1995. [DAE IV.C Exh. 4].

d. The Defendants' Joint Statement of Evidence Before Congress (JSCR), paragraphs 718-770, filed by the Department of Justice on May 26, 1995.

Based upon my review of these documents, I have the following comments and opinions:

3. Although Mr. Haakinson's impressive career and his extensive knowledge of signal propagation issues demonstrates expertise in that area, his curriculum vitae contains no evidence of professional experience in issues involving cable system operation and consumer electronics equipment functionality. Many of the conclusions presented by Mr. Haakinson are incorrect in my opinion and reflect an apparent misunderstanding of the integration of A/B switches in a modern consumer electronic equipment environment. In fact, most of the consumer equipment complexities discussed by Mr. Haakinson are the result of the increasing sophistication of the features found in television receivers and VCRs on the one hand and the single channel output of a standard cable converter on the other. Obviously, most these complexities exist regardless of whether an A/B switch is used in the cable home. Mr. Haakinson's declaration follows his earlier-filed report in most respects and many of the issues regarding A/B switches raised in his report were addressed directly in my initial affidavit. There are, however, significant differences between Mr. Haakinson's expert report filed on April 21, 1995, and his declaration filed on May 26, 1995. I address these new matters below in the order they are presented in his declaration.

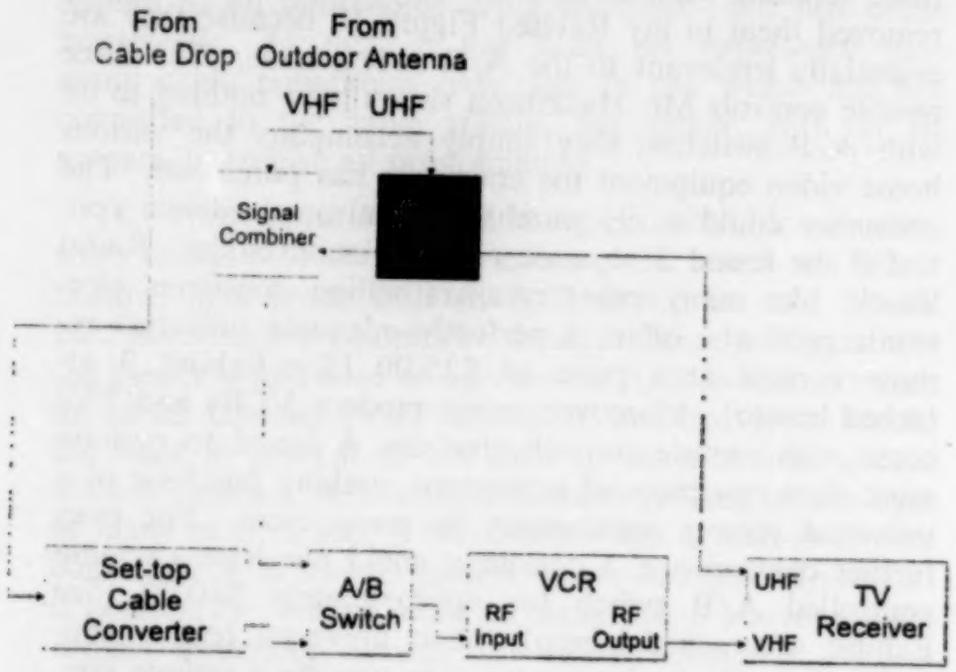
4. *Paragraph 43*. Mr. Haakinson notes that "integrated" home entertainment systems may involve "complex" interconnections. Needless to say, integrated video systems do involve the interconnection of various pieces of equipment. However, these systems come with their own instructions for connecting the components; essentially involve the same degree of complexity in their component interconnection regardless of the presence of cable; and often contain built-in, electronic input selector switches. Typically, complex home entertainment systems come equipped with an input port which can accommodate an antenna lead. Thus, the addition of an antenna to permit off-air viewing does not result in a signifi-

cant degree of complexity. In my experience, the existing prevalence of home entertainment systems involving VCRs, laser disk players, video games, and other such devices, and the necessity of using input selector switches to alternate between them demonstrate that viewers are capable of handling virtually any "complexity" that Mr. Haakinson claims will result.

5. *Paragraph 44.* The comments made by Reed Hundt, Chairman of the FCC, quoted in this paragraph, were made at the annual convention of the National Cable Television Association in Dallas, Texas, which I attended, and refer directly to the issue of whether standards should be promulgated by the FCC to cover the transmission and processing of digital video signals. The issues include compression protocols (MPEG2 versus Digicipher) and modulation methods (QAM versus VSB). Chairman Hundt expressed his concern that the cable industry will proceed on a *de facto* basis and adopt various digital modulation methods and/or various digital compression methods which will make it difficult to connect a television receiver or VCR to a *digital* programming stream. I have significant experience regarding these issues based on my participation in the Joint Engineering Committee composed of representatives of the cable industry and the Electronic Industry Association (the manufacturers of television sets and VCRs). In my opinion, while these issues are very important to the future of cable television, they are not relevant to the issue of reception of off-air, analog television signals using an A/B switch.

6. *Paragraphs 45-47.* An equipment diagram somewhat similar to Figure 10 of Mr. Haakinson's declaration (and labeled "Figure 10. Typical home TV system") appeared at ¶ 43 of Mr. Haakinson's Expert Report filed on April 21, 1995 [Attached hereto as Exhibit 1]. As I stated in my deposition [attached hereto as Exhibit 2] at pages 144-49, that configuration contained errors and was unduly complex. Mr. Haakinson altered his original

Figure 10 to the form it now appears in his declaration (at ¶ 45), apparently in an effort to correct certain of those errors. However, from an engineering standpoint. it is still more complex than necessary. I have set out below (in "Revised Figure 10") a slight modification to Mr. Haakinson's Figure 10; my version assumes that a TV viewer would choose to configure his equipment to avoid unnecessary complexity in switching between cable and off-air programming.



Revised Figure 10

7. This "Revised Figure 10" contains the same basic components as Mr. Haakinson's Figure 10; however, the splitter (shaded box) has been moved. Under this revision, the viewer does not have to use the tuning mode switch to watch either cable or off-air signals, whether they are VHF or UHF. Moreover, the viewer would need to use the A/B switch only if he wanted to watch a VHF signal not carried by the cable system—a very rare circumstance. To tape a program from an off-air signal,

the viewer would have to use the A/B switch and tune the VCR to the desired channel. However, no tuning mode switching would be involved because the VCR would always be set in the "normal" mode (the converter output would always be on channel 3, a normal VHF channel).

8. Apparently in an effort to make his diagram look more complicated than necessary, Mr. Haakinson shows three separate remote controls in his Figure 10. I have removed them in my Revised Figure 10 because they are essentially irrelevant to the A/B switch issue. The three remote controls Mr. Haakinson shows have nothing to do with A/B switches; they simply accompany the various home video equipment the consumer has purchased. The consumer could easily purchase a universal remote control if she found 3 separate remotes inconvenient. Radio Shack, like many other retailers selling consumer electronic products, offers a perfectly adequate universal remote control at a price of $25.00 [*See* Exhibit 3 attached hereto]. Moreover, many modern VCRs and TVs come with remote controls that are designed to operate more than one piece of equipment, making purchase of a universal remote unnecessary in many cases. For even further convenience, a consumer could purchase a remote controlled A/B switch for approximately $40.00 [*See* Exhibit 4 attached hereto]. Most universal remote controls can easily be programmed to operate a remote controlled A/B switch, as well as the converter, the VCR and the TV set.

9. *Paragraph 48.* The NCTA engineering report issued in 1986, cited in this paragraph, refers to a number of diagrams issued to cover installation of cable television service in homes with VCRs, television receivers and converters. These diagrams were designed, for the most part, to preserve equipment functionality by overcoming the single output channel limitation of the cable converter. In my experience in the cable industry, that problem still

exists today and has little to do with the presence or absence of an A/B switch. Moreover, as I noted in my initial affidavit, InterMedia Partners published an internal guide for installers that had 19 equipment scenarios, but most installations were covered by four relatively simple diagrams (¶ 26).

10. *Paragraph 49.* Mr. Haakinson notes that the ability to view off-air signals will be restricted to television receivers connected to the antenna. This is correct and applies to all households using antennas—not just cable households. In fact, it has been my experience that many cable households have sets in use which are *not* connected to the cable system, but rather, rely on an antenna to receive all programming.

11. *Paragraphs 50-52.* I disagree with Mr. Haakinson's analysis of the steps necessary to watch an off-air channel in a home with an A/B switch in use. Under Mr. Haakinson's equipment configuration in Figure 10, the viewer would need to operate the A/B switch to watch an off-air channel (VHF or UHF), but the viewer would not need to get out of his chair at all if a remote controlled, external A/B switch is employed or, in the case of many modern sets, if the receiver has a built-in remote controlled A/B switch (assuming no antenna adjustment is necessary). As discussed in paragraph 8 above, remote control switching devices are readily available. Moreover, if the viewer used the equipment configuration in Revised Figure 10, she would only have to use the A/B switch to watch an off-air *VHF* station not carried on cable—a rare circumstance in my experience. Finally, as discussed in paragraph 7 above, in no case would it be necessary to change the tuning mode of the TV or VCR to watch or tape an off-air signal (whether the channel involved was a VHF channel or a UHF channel).

12. *Paragraph 53.* The "diminished system control" discussed in this paragraph primarily arises from the

single channel output of the cable converter and not because of an A/B switch.

(a) Recording a broadcast program for later viewing while watching a cable channel cannot be done easily because most cable converters only output one video channel at a time. Thus, with a converter in use, it is equally difficult to watch one cable channel while taping another cable channel. To solve this problem, as Mr. Haakinson acknowledges, cable subscribers would need to utilize additional equipment such as the Qintar switch discussed in paragraph 46 of my initial affidavit.

(b) Recording a cable program for later viewing while watching a broadcast program is the mirror image of the problem set forth in (a), above. The problem is inherent with most cable converters.

(c) Viewing cable and antenna signals throughout the house requires the distribution of the cable and antenna signals. Any cable subscriber with multiple TV sets who wishes to view different cable programs simultaneously on more than one set in the home will have to have each set connected to a cable wire, regardless of whether he or she uses an A/B switch to view off-air broadcasting, as well. Similarly, multiple antenna connections will be necessary if a viewer wants to watch programs received via a roof-top antenna on multiple sets in the home. Such multiple connections will thus routinely be made by any television viewer who wishes to maintain the "capability" that Mr. Haakinson describes.

(d) Hopping between two football games would be no problem if both games were on off-air

channels, even if one of the channels was not carried on cable. The consumer would simply use the antenna for both signals. Similarly, if both games were on channels carried by cable, there would be no problem. If, however, one of the games was found only on cable and one game was only found on an off-air signal not carried by the cable system, the consumer would have to use an A/B switch to select between the two games. This could be done with a remote control as explained earlier.

(e) Viewing picture-in-picture in a home with a cable converter is a problem both for situations where one signal is cable and the second is off-the-air and where both signals are on cable, because the cable converter has only one output channel. This problem will exist whether there is an A/B switch in use or not. However, in cases where the receiver has at least two input ports, such as in Mr. Haakinson's Figure 10, the consumer could use picture-in-picture, if if he owns a high-end TV set with such capability. The VCR output would be one picture source and the other source could be an antenna lead or a cable connection which has been routed around the converter.

(f) This scenario does not make sense. A consumer would not put the A/B switch *before* the converter in any case, regardless of whether pay-per-view was available.

13. *Paragraph 54.* The *Consumer Reports* article quoted in this paragraph focused on the compatibility of cable television systems and modern consumer electronics equipment. The complexities discussed in the article primarily arose from the premise that the cable household used a converter with a single output channel. While

it is certainly true that a converter causes compatibility problems with some modern features of consumer video equipment (picture-in-picture, for example), these problems exist whether or not the household uses an off-air antenna to receive programming in addition to the programming delivered by the cable system. Loss of receiver features like picture-in-picture in a home with a cable converter is not an A/B switch issue.

14. *Paragraph 55.* Mr. Haakinson is correct when he states that an improperly installed A/B switch can couple the signals of the cable system to an off-air antenna. However, if the switch was installed in such a manner, there would be no viewable picture on the television receiver, which would surely alert the viewer to the problem immediately. Moreover, even if the problem was not detected for some reason, the cable operator would discover it quickly in the course of its federally-mandated cumulative leakage sweeps. In my experience, I have found that signal leakage from improper installation is not a problem. (Initial affidavit, ¶¶ 57-59; 47 C.F.R. § 76.610, et seq.).

15. *Paragraph 56.* The potential problems with A/B switches noted in this paragraph had varying degrees of technical validity back in 1986 when they were raised. (Initial affidavit ¶¶ 53-54). However, the FCC in a later rulemaking adopted much higher performance standards for antenna selector switches in Part 15 of its rules. (Initial affidavit ¶¶ 48-52). All modern antenna selector switches must meet these standards, which are consistent with the isolation requirements set forth by Mr. Haakinson. (Initial affidavit ¶¶ 55-56). As a result, the matters discussed in the NCTA material quoted by Mr. Haakinson are currently not a problem associated with A/B switch usage.

16. *Paragraph 57.* The NCTA Engineering Committee did estimate a five year life for A/B switches back

in 1986. However, the adoption of tougher performance standards for antenna selector switches has led to much higher quality products that have a much longer life. As I related in my initial affidavit (¶¶ 66-67), my own research indicates that the probability of switch failure today is very low—less than 1%—and replacement costs are minimal.

17. *Paragraph 58 and 63.* Mr. Haakinson concludes that the use of an A/B switch to select off-air signals by a cable subscriber is "theoretically" possible, but is not a "reasonable substitute" for cable carriage of a signal. In my opinion, the use of an A/B switch to select off-air programming is an effective technology which is in widespread use today. It is, for instance, used by over 2,000,000 DBS and MMDS customers every day in this country to select local programming (Initial affidavit, ¶¶ 73-74). It was quickly and widely deployed in Corpus Christi, Texas, after a retransmission consent dispute forced the local cable operator to drop a number of popular television channels in that market (Initial affidavit, ¶¶ 71-72). Thousands of cable households were able to install A/B switches quickly enough to prevent the local television stations from suffering a significant ratings drop. (*Id.*)

Defendants' Joint Statement of Evidence before Congress (JSCR)

18. Paragraphs 718 through 770 of the JSCR set out selected portions of the testimony and arguments of a number of witnesses before the Congress and a number of parties before the FCC. I have grouped the statements relating to A/B switches by subject matter and will address each pertinent issue seriatim.

19. *Improper Installation of A/B Switch Can Lead to Signal Leakage* (JSCR ¶¶ 718, 721, 761, 764, 766 & 767). It is true that an A/B switch could couple the in-

coming cable signals with a customer's antenna if the leads were incorrectly connected and the switch is in the "correct" position to complete the circuit. However, as I explained in my Initial Affidavit (¶ 58), it is very unlikely that the mistake will remain undiscovered for any significant period of time. Improper connection which leads to signal leakage will result in no viewable picture in virtually every case. The viewer would certainly notice this and make immediate corrections. However, if for some reason no immediate correction is made, the cable operator will discover the leaking signal during its routine CLI measurements (47 C.F.R. § 76.610, et seq.). In 1986, when most of the statements quoted in the JSCR were made, there was concern that switches with low isolation might provide a picture even if incorrectly connected. That concern is no longer a factor because of the FCC standards imposed on today's high isolation antenna selector switches. (Initial Affidavit ¶¶ 55-56).

20. *Poor Isolation Will Result in Degraded Off-Air Pictures* (JSCR ¶¶ 718, 738 & 739). The fear in 1986 was that the poor isolation of existing A/B switches would result in degraded off-air pictures. The theory was that cable subscribers would not use A/B switches if it meant watching poor quality video. This was a legitimate concern prior to the adoption of minimum technical standards for antenna selector switches in 1987. *See* 47 C.F.R. §§ 15.115 and 15.117. However, in my opinion, today's switches have sufficient isolation to prevent degradation of signals passing through the switch. (Initial Affidavit ¶¶ 55-56).

21. *Installation of the Switch Will Be Difficult For Consumers* (JSCR ¶¶ 718, 752, 758, 763 & 767). It was often argued that installing and using an A/B switch would be difficult in modern television households using VCRs and, perhaps, other video equipment. During my ten-year tenure with Gill Industries, I managed the technical operation of a large, dual-cable system in San Jose,

California, the heart of the Silicon Valley area. We serviced many households with complex video equipment configurations and delivered two separate cable lines to virtually every cable home. Almost all of our homes had an A/B switch that was used to switch from the "A" cable to the "B" cable. Although we prepared guides for our installers covering a number of possible installation scenarios, it was my experience that most installations were covered by four relatively simple equipment diagrams. Moreover, the experience in Corpus Christi, Texas is evidence that A/B switches can be installed easily in most cable households (Initial Affidavit ¶¶ 71-72).

22. *A/B Switches Will Necessitate Fine Tuning Adjustments* (JSCR ¶¶ 759 & 760). In 1986, the independent television stations argued that one of the adjustments that might have to be made when changing from the cable mode to the off-air mode would be "fine tuning" of the television receiver. An adjustment to the automatic fine tuning ("AFT") control, or the automatic frequency control ("AFC") knob was indeed a possibility in old television receivers. However, the development of electronic tuners eliminated this control years ago. It is conceivable that some homes still have a working receiver with an AFC knob; however, since the average family purchases a new television receiver every 6.4 years (Initial Affidavit ¶ 44), it is unlikely that the principal set in use has such a control.

23. *A/B Swtiches Are Expensive* (JSCR ¶¶ 719, 720, 751, 753, 754, 755, 756, 757 & 769). These arguments were raised in 1986, primarily by the cable industry, because the FCC initially proposed that cable operators provide free A/B switches to every customer. The potential aggregate liability for cable operators was significant, even though the cost of each switch was quite low. As I noted in my Initial Affidavit (¶ 22), switches meeting the FCC standards for antenna selector switches are

readily available throughout the United States at a cost of less than $10.00. Even where a video configuration involves the installation of splitters and combiners, as Mr. Haakinson's Figure 10 requires, the components are still relatively inexpensive. In the case of Figure 10, the cost of the A/B switch, the splitter, the combiner and the cable jumpers would be approximately $35.00, or equal to one month's cable bill in many homes.

24. *A/B Switches Wear Out and Fail* (JSCR ¶¶ 721, 738, 751, 752, 753 & 762). External A/B switches are mechanical devices and all mechanical devices will ultimately fail. The failure rate of the "game" type of A/B switches extant in 1986 may well have been a problem if those switches had been pressed into use as antenna selector switches, as many objectors feared. Fortunately that did not occur. Instead, the FCC set new standards for antenna-selector switches, that is, A/B switches used specifically to select between cable programming and off-air signals. The A/B switches that meet the FCC Part 15 standards for antenna selector switches are high isolation switches and their manufacturers must verify that the switch meets the FCC standards. In my opinion, the quality of the current antenna selector A/B switches is far superior to the quality of the "game" A/B switches available in 1986. In order to determine the failure rate of modern A/B switches, I checked the maintenance records of a large dual-cable ssytem and found that the failure rate per switch was less than 1% per year. (Initial Affidavit, ¶¶ 66-67). Based on my experience with and study of high isolation A/B switches, it is my opinion that modern A/B switches do not have an unacceptable failure rate.

25. *Consumers Will Not Use A/B Switches* (JSCR 742, 743, 744, 745, 746, 747 & 749). This curious argument seems to be based upon the assumption that consumers are too lazy to use an A/B antenna selector switch because of the physical effort required to operate the

switch. Whatever the circumstances were in 1986, it is clearly the case today that consumers regularly use A/B switches of all types. In modern home entertainment systems, A/B input selector switches are used to connect and to select among the TV, VCR, laser disk player, camcorder and other devices. Two million DBS and MMDS households currently use A/B switches to select local off-air programming (Initial Affidavit, ¶¶ 73-74).

26. In summary, having reviewed both Mr. Haakinson's declaration and the materials quoted in the Defendants' Joint Statement of Evidence before Congress, I am still of the opinion, based on my experience in the cable television industry, that A/B antenna selector switches are an acceptable, low-cost method of providing access to cable television programming and off-air broadcast programming in a cable household.

June 13, 1995

/s/ David Large
DAVID LARGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

TIME WARNER ENTERTAINMENT COMPANY, L.P.'S AFFIDAVITS IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' SUMMARY JUDGMENT MOTIONS AND IN FURTHER SUPPORT OF ITS SUMMARY JUDGMENT MOTION

* * * *

June 16, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SUPPLEMENTAL AFFIDAVIT OF BRENDAN CLOUSTON

STATE OF COLORADO)
) ss.:
COUNTY OF ARAPAHOE)

I, BRENDAN CLOUSTON, on behalf of Tele-Communications, Inc. ("TCI"), being duly sworn, depose and state the following based on my personal knowledge:

1. I am President of TCI Communications, Inc., a wholly-owned subsidiary of TCI that operates its cable systems, as well as its satellite-delivered programming operations. I submit this affidavit to supplement the affidavit I previously submitted on May 25, 1995, which described the injury to TCI from the must-carry provisions of the 1992 Cable Act.

Cable Advertising Revenue

2. Unlike the case of broadcast television stations, the sale of cable advertising represents only a small, incremental source of revenue for cable operators like TCI. At present, revenues from the sale of advertising comprise only a small part—less than 5% in 1994—of TCI's total revenues. The overwhelming majority of TCI's cable revenues comes from fees paid by subscribers. To generate those fees, we must provide our subscribers with popular programming that they want to watch. Making our programming decisions solely on the basis of our

ability to sell advertising would be foolhardy. The loss of subscriber revenue that we would incur by replacing popular programming with less popular programming for the sake of advertising sales would far exceed whatever profit we could conceivably make from those advertising sales.

3. Cable operators often must pay fees to cable programming networks for the right to carry their programming. In most cases, TCI pays significantly more in fees to cable programming networks than it receives in advertising revenue from that programming and, as noted, advertising revenues also are dwarfed by subscriber fees. It therefore would be a money-losing proposition to replace broadcast stations with any measurable viewing (which are popular with subscribers and therefore generate subscriber revenue, even though they generate no advertising income) with cable programming networks (which may cost more to offer than they generate in advertising revenue), particularly if the switch caused a loss of cable subscribers.

4. I understand that defendants have alleged that cable operators have the incentive to drop local broadcasters in order to lessen competition for advertising revenues. That allegation is untrue. I have already explained why it makes no economic sense for TCI to replace viewed local broadcasters with cable programming networks. Similarly, because TCI's principal goal is to maximize subscriber satisfaction and therefore subscriber revenue, it must continue to carry local broadcast stations that are popular with subscribers. The only broadcast stations in danger of not receiving carriage from cable operators—and the only broadcast stations that TCI did not routinely carry prior to the imposition of the must-carry rules in 1993—are broadcast stations with no discernable viewer interest. Little-watched broadcast stations are unlikely to be significant sources of advertising sales. Because

advertising rates, and therefore advertising revenues, are a function of viewership, little-watched broadcast stations probably are not achieving meaningful advertising revenue.

* * * *

6. Finally, I can say conclusively that TCI does not choose the programming it offers to its subscribers based upon the advertising potential of that programming. Even though we are in the cable advertising business, the revenue that advertising provides is a minor consideration compared to maximizing subscriber revenues, which can only be done by giving subscribers the programming content they desire.

* * * *

June 14, 1995

/s/ Brendan Clouston
BRENDAN CLOUSTON

[Jurat Omitted]

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REBUTTAL DECLARATIONS AND EXHIBITS

VOLUME VIII

* * * *

Dated: June 16, 1995

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

REBUTTAL DECLARATION OF ROGER G. NOLL

1. My name is Roger G. Noll, and I have previously submitted a declaration in this proceeding that sets forth an economic analysis of the effects of must-carry rules on the cable television and broadcasting industries. My professional background and qualifications are contained in that declaration, and my current curriculum vita is attached as an appendix to this declaration. I have been asked by the defendants in this case to examine and to comment on the Declaration of Stanley M. Besen on behalf of the plaintiffs, and this declaration constitutes the results of that assignment.

Must Carry and the "Demise" of Broadcast Television

2. Dr. Besen's declaration is based on the premise that the core issue in this case is whether the presence or absence of a must-carry rule for cable television is crucial to the survival of the over-the-air broadcasting industry. Dr. Besen scrupulously reports that his assignment by counsel for the plaintiffs was "to determine whether the system of local broadcasting would be jeopardized—that is, would disappear—in the absence of must carry rules and whether Congress could reasonably have concluded . . . that this would be the case." [1]

3. By defining Dr. Besen's assignment in this way, counsel for the plaintiffs has made nearly all of his report

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[1] "Declaration of Stanley M. Besen on Behalf of Plaintiffs Turner Broadcasting System, Inc., et al." (hereafter, Besen Declaration),

irrelevant for the purpose of disputing the Government's contentions and the conclusions of the defendants experts. Of course, the absence of must carry would not threaten the survival of the broadcasting industry. The purpose of must carry is not to protect over-the-air broadcasters, but to protect consumers from a reduction in the quantity and quality of over-the-air broadcast stations.

4. Dr. Besen's report is based on drawing an analogy between the debate about cable regulation that took place in the 1960s and 1970s and the present debate about the recent reregulation of cable television. Dr. Besen reviews the earlier debate in his report, and shows that the "prophesy of doom" that cable would destroy over-the-air broadcasting was incorrect.[2] He then argues that a similar conclusion is valid today: deregulation would not cause most stations to be dropped from cable systems, and so the existence of over-the-air broadcasting is not threatened.

5. To my knowledge, no party or expert that is involved in this case maintains that without must-carry the entire broadcast industry will be destroyed. Dr. Besen has been asked by plaintiffs' counsel to attack a straw dummy. The actual economic issues in this case are: first, whether a significant number of broadcast stations would be dropped or harmfully repositioned in the absence of must-carry rules; second, whether stations so dropped or repositioned would respond by providing a lower quantity and quality of programs or even by leaving the air; and third, whether television viewers and advertisers would be harmed by these consequences. The answer to all three issues can be (and is) "yes" without it also being the case that the termination of must-carry rules would destroy the entire broadcasting industry.

6. One can not emphasize strongly enough that *all* economic experts and studies on *both sides* of this case

[2] See especially the section of the Besen Declaration beginning on p. 24, "The Regulation of Cable Television."

are in relatively close agreement about the facts. In particular, Dr. Besen's analysis provides a specific, quantitative estimate of the number of stations that were not carried when must-carry rules were not in effect: ten percent of stations with a reported rating, and 69 percent of stations with an unreported rating.[3] Eight percent of stations with rating shares exceeding 0.5 percent were not carried. Indeed, cable systems chose not to carry 34 percent of stations with rating shares between 0.5 percent and 2.0 percent, 19 percent of stations with rating shares between 2.0 and 5.0, and eight percent of stations with rating shares between 5.0 and 10.0.[4] All of these stations had ratings shares that are comparable to or exceed all of the cable networks. Dr. Besen estimates that 39 percent of local UHF independent stations and 22 percent of local noncommercial stations were not carried.[5]

7. Others present somewhat different estimates, including the Federal Communications Commission staff, the Federal Trade Commission staff, the National Cable Television Association, and other experts in the case, but no one finds no effect, and everyone concludes that the number of dropped stations will be in the hundreds. And, everyone agrees that the drop rates will be largest for UHF independent stations and noncommercial stations.

8. The broad similarity of quantitative estimates is dramatically inconsistent with the gaping differences in the conclusions that have been drawn from them. Some, like Dr. Besen, the FTC staff, and the NCTA, leap from the estimate that approximately 90 percent of stations will not be dropped to the conclusion that the "incentives to drop local stations" are "small or non-existent" and that "[n]o empirical basis for must carry provisions can

[3] Besen Declaration, p. 42.

[4] Besen Declaration, p. 43.

[5] Besen Declaration, pp. 5, 60.

thus be found in observed operator behavior."[6] Aside from the obviously incorrect statement that drops are "nonexistent," the strength with which this conclusion is stated lies in the fact that it is addressed to the wrong question: will over-the-air broadcasting be destroyed? No one disputes that ABC, CBS, NBC and Fox will not experience massive drops of their affiliates if there is no must-carry rule. Of course, this conclusion really requires no elaborate analysis, and has nothing to do with why the Federal Communications Commission and Congress have attempted to implement and must-carry policy.

9. The actual question that Congress and the FCC have addressed is: will a large number of television viewers and advertisers experience a reduction in viewing and advertising options as a result of the termination of must-carry rules? The answer here is clearly yes: projecting from Dr. Besen's estimates, cable viewers will lose at least two-fifths of their UHF independent stations and a fifth of their noncommercial stations, and advertisers (especially specialized local advertisers) will lose access to the cable audience through the same UHF independents. Some of these stations will leave the air, and others will cut back on their hours of operation and quality of programming. Viewers who do not subscribe to cable will have no replacements; advertisers can switch to "local local" cable advertising, but will have diminished access to nonsubscribing viewers because there will be fewer stations and fewer viewers of the stations that remain. These conclusions are inescapable, are not contradicted by the various studies that oppose must-carry rules, and are the strong empirical basis for the conclusion by Congress that must-carry rules were desirable public policy.

Writing Off the Dropped Stations

10. In order to conclude that must-carry rules are unnecessary and/or undesirable, opponents of the rules

[6] Besen Declaration, p. 81.

must make an additional argument: that no one will be harmed if hundreds of stations are dropped or repositioned on cable systems, and as a result leave the air or cut back on the quality and quantity of their programming. Dr. Besen makes two standard arguments in support of this proposition: first, the dropped stations tend to have the lowest ratings, and second, the dropped stations add no value because their programs are "duplicative."

11. Of course, Dr. Besen's data, summarized above, clearly show that the first point is not strictly true—he estimates that two percent of VHF independents and Fox affiliates, one percent of affiliates of the three major networks, and two percent of stations with audience shares exceeding ten percent will be dropped.[7] But even the lowest-rated stations do attract audiences that are as large or larger than most cable networks. To say that viewers will not be harmed if low-rated stations are dropped and leave the air is equivalent to saying that viewers would not be harmed if all but a handful of cable networks also disappeared. In reality, the commercial stations attract advertisers, and the noncommercial stations attract members. Obviously, dropping these stations would harm nonsubscribers to cable who witness the demise or reduction in quality of the stations that are dropped, and advertisers who want to use the weakened or defunct station for targeted local advertising. The existence of a harm can not be denied; the issues are whether must-carry avoids this harm at excessive cost.

12. Dr. Besen is willing to write off some non-carried stations because, he asserts, they are "duplicative." Dr. Besen does not state what constitutes duplication, or why the statutory protection that exempts from must-carry requirements substantially duplicative programming[8] are

[7] Besen Declaration, pp. 5, 43, 60.

[8] See 47 U.S.C. 535(b)(3)(C), (E).

insufficient, or why duplication, if it exists, lacks value. As an example of how cable avoided the "duplicative programming that characterizes broadcasting," he cites the development of "all-news, all-weather, all-sports, and all-music services" that serve "small but intense demands." [9] But broadcast stations produce news, weather, sports, and music programs. It is hardly obvious that they duplicate each other but that four cable networks that do the same thing do not duplicate the broadcasters. The more plausible view is that a basketball game on ESPN is pretty much the same basic program as a basketball game on its affiliated network, ABC, and that a weather report on CNN is in the same category as a weather report on its affiliate, TWC (The Weather Channel), by Willard Scott on the NBC Today Show, or on the local television station's evening news program.

13. Beyond the fogginess of the concept of duplication is the inconsistency of Dr. Besen's personal evaluation of duplication and the mountain of evidence that consumers do not view television in the way that he does. The research literature indicates that duplicate networks are highly valued by cable subscribers. The second and third public television outlets in a metropolitan area manage to overcome the severe "free rider" problem of collecting money for something that is available for free, and generate memberships for providing what opponents of must-carry dismiss as valueless duplication. Dr. Besen chooses not to explain why, if low-rated, second and third non-commercial outlets generate voluntary contributions from cable ssytem subscribers, these stations have no value and will not be missed if dropped.

14. Dr. Besen is willing to disregard the harm that is created when stations are not carried by cable systems because "cable operators . . . chose to carry those local stations that together account for virtually all local tele-

[9] Besen Declaration, p. 21.

vision viewing." [10] Dr. Besen's argument that this harm can be ignored is based on a version of the argument that a competitive industry maximizes the benefit of consumers. In essence, the argument is that cable systems, in maximizing profits, offer viewers the menu of programs that maximizes the net benefit of cable to customers. Specifically, Dr. Besen states: "As a logical matter, the claims [in support of must carry] wholly ignore the obviously significant factor of lost subscriber revenue that a cable operator will experience if it deletes . . . a broadcast station that its subscribers value. Moreover, as an empirical matter, . . . lost subscriber revenues from deleting most stations, and virtually any station with significant viewing, apparently exceed any gain that the cable operator might realize from excluding them." [11] This statement is not only without theoretical or empirical support, it is flatly contradicted by Dr. Besen's own data, not to mention by virtually all of the scholarly literature and government studies about the economics of cable television (as I observed in my first declaration, pp. 22-23).[12] As pointed out in previous paragraphs, Dr. Besen indeed finds that many stations are dropped, and that these include some network affiliates and some stations

[10] Besen Declaration, p. 62.

[11] Besen Declaration, p. 67.

[12] Dr. Besen's Declaration contains only three references to scholarly studies written by someone other than himself, and none of the three deals with the economics of cable. Except for his 1984 book, *Misregulating Television*, he references no scholarly study of any aspect of the industry that has been published since 1980. Dr. Besen also references none of the documents discovered in this case, and does not mention the FCC's findings in developing its 1994 cable regulations. Because most of the evidence in this material is inconsistent with his views, it is puzzling that Dr. Besen chose not to explain to us why all research on cable television during the past fifteen years should be dismissed in favor of his opinions.

with audience shares exceeding five percent, which is more than is achieved by any cable network.

15. To conclude that consumer welfare is unaffected by decisions to drop even low-rated stations, or that a cable system faces incentives that cause it to make choices that maximize consumer welfare, is unwarranted. For four well-known reasons, cable systems face distorted incentives and so can not be expected to behave in a manner that maximizes net consumer welfare.

16. First, almost all cable systems are monopolies. They possess extensive market power, so that their profit-maximizing strategy is to provide less service than the amount that would maximize net consumer welfare. The research literature, congress, and the FCC (for citations, see my first declaration) have all concluded that cable possesses substantial market power and uses that power in ways that harm consumers. Moreover, now that basic cable service is subject to price regulation by the Federal Communnications Commission, cable systems have an added incentive to carry more programming on less regulated or unregulated tiers of service, and reduce the level of service on basic, which is the tier that carries local stations. See my first declaration at 22.

17. Dr. Besen offers only one reason to reject these findings: the possibility of competition sometime in the future from new technologies, especially direct satellite broadcasting (DBS). In arguing the importance of these technologies, he simply ignores the FCC's findings, discussed in my first declaration, that these technologies do not now, and will not for many years, constitute a significant competitive threat to the market power of cable television. By not taking into account the present durable market power and rate regulation of cable, Dr. Besen's assertion that the incentives facing the cable industry lead it to maximize consumer welfare is incorrect.

18. Second, charging viewers for access to programs always creates an inefficiency. Television programs are pure public goods in that the cost of a program does not depend on how many viewers watch it. Some viewers who are willing to pay the additional cost of delivering a program to them are nonetheless excluded because the price charged for cable service exceeds the amount these viewers are willing to pay. Consequently, programming that survives by charging viewers can not be perfectly competitive, and can not achieve the theoretical perfection of the competitive market. The fact that viewers pay for cable does not mean that cable television solves the problem of optimal supply of programming, even if there were, in fact, numerous competitive multichannel distribution systems. To the contrary, the Spence-Owen model of viewer preference (cited and discussed in my first declaration) shows that under plausible conditions a pure pay system produces less consumer welfare than an advertiser-supported, free system. In making television policy, decision makers face an inevitable trade-off between the inefficiencies of public-good provision when the intensity of consumer demand is not taken into account and the inefficiencies of setting consumer prices above the incremental cost of delivering programs to consumers. Dr. Besen's appeals to the supposed superiority of unfettered markets in optimizing the supply of programming simply dilemma of broadcast policy.

19. Third, cable systems face different revenue potentials from different sources of programs that are otherwise identical to content. Cable networks let cable systems place advertising on cable programs or, in the case of shopping networks, pay cable operators a commission based on sales to cable subscribers. Broadcasters do neither. Most (but not all) cable networks charge a small monthly fee for carrying their network; stations that elect "must-carry" status (rather than require retransmission consent) do not. Hence, the cable operator

will pick the cable network if the cable system can collect advertising or commission revenues in excess of the monthly carriage fee (if any). Even if the cable network has fewer viewers than the over-the-air station, as long as it produces a positive net revenue (advertising plus commissions minus carriage fee) it will be preferred to the broadcast station.

20. In dismissing this third argument, Dr. Besen argues that any station that is valued by subscribers will be carried by the local cable system. This view is inconsistent with econometric studies of cable demand, which indicate that dropping the second or third noncommercial station or a UHF independent station has essentially no effect on cable subscriptions. These are the types of stations that largely account for the non-carried stations reported by Dr. Besen,[13] and which could not successfully invoke the "retransmission consent" provisions to charge local cable companies for the right to carry them. Likewise, adding another cable network to a typical system, offering 35 or more channels, has essentially no effect on cable subscriptions. Common sense suggests that these results are correct: if viewers are faced with the choice of sacrificing one over-the-air station to gain access to twenty or more cable networks, they will still subscribe to cable even if they would prefer the dropped television station to one of the cable networks. And, numerous documents produced in this case about consumer and cable system behavior, many of which are cited in my first declaration, confirm that substituting between low-rated over-the-air television stations and low-rated cable networks, one way or the other, has no effect on subscriber revenues.

21. Dr. Besen also dismisses this third argument on the ground that the fraction of total advertising accounted

[13] Besen Declaration, p. 50.

for by cable systems is tiny.[14] This argument is incorrect economic reasoning. The relevant issue is whether carrying a cable network produces positive net revenues, not whether these revenues are large or small compared to total advertising in the U.S., ad revenues of local network affiliates, or the price of spots on a Super Bowl telecast. Numerous documents produced in this case, many of which are cited in my first declaration, clearly show that cable operators view advertising revenue as important, as likely to be more important in the future, as a basis for deciding which programming sources to offer, and even as a good reason to merge, trade cable properties, and form advertising joint ventures. Indeed, the additional value of cable networks with ratings equal to or less than the ratings of the local stations that are dropped is derived from cable advertising inserts, and sufficient to enable these low-rated services to charge a small monthly fee to cable systems for carriage.[15] Dr. Besen offers no explanation for why this evidence concerning the distorting effects of cable system advertising should be dismissed.

22. Fourth, cable operators have an incentive to favor their affiliated cable networks because the latter receive the carriage fee and sell advertising, or earn commissions on the sale of products. Dr. Besen dismisses this argument as "unjustified" because "[t]his incentive, if it exists, would apply to not just local broadcasters but also to cable networks in which the operator did not have an equity interest" [16] and "there is nothing in the [Government's] argument to suggest that broadcast stations would be more disadvantaged than unaffiliated cable program-

[14] Besen Declaration, p. 7.

[15] By comparison, low-rated over-the-air stations can not successfully invoke retransmission consent because cable systems can not offset a cost for carrying these stations by inserting advertising into their programs.

[16] Besen Declaration, p. 8-9.

ming services." [17] Dr. Besen then argues that carriage decisions are unlikely to be affected by vertical integration, because favoring programming in which the cable operator has an equity interest would be unlikely to have any eeffct on cable advertising rates or nationwide carriage fees by affiliated cable networks.[18] These observations are irrelevant; even if the failure to carry local stations (or unaffiliated cable networks) has no effect on the prices charged for the cable system's affiliated cable networks, cable systems have an incentive to drop stations as long as some of the advertising on them switches to cable systems, even if advertising rates and carriage fees do not change. Whereas Dr. Besen asserts that this advertising shift effect is likely to be small, he does not (and logically and empirically could not) assert that it is nonexistent.

23. Dr. Besen then proceeds to report that he can find no effect of vertical integration on cable programming choices; however, he offers no explanation for *why numerous other econometric studies of cable system program choice find that vertical integration does effect carriage decisions.* The important point here is that Congress can hardly be faulted for basing its decision about must-carry rules on the consensus conclusion reached by other studies of cable program carriage before Dr. Besen's May, 1995, Declaration, even if Dr. Besen's new results reversed the preceding decade of findings (which they do not).

Defining a Local Market

24. Dr. Besen is not satisfied with how Congress chose to define local markets for the purpose of must-carry requirements, referring to "what the [1992 Cable] Act has arbitrarily defined to be local." [19] He then offers his own definition of a local market: all stations that are in the

[17] Besen Declaration, p. 62.

[18] Besen Declaration, pp. 58-59, 62-64.

[19] Besen Declaration, p. 32.

same Area of Dominant Influence as the cable system and that are within 50 miles of the principal headend of the system.[20] He then asserts, without any evidence or explanation, that this definition is closer to what viewers regard as a local station.[21]

25. As Dr. Besen points out, "no single definition of a local . . . station can provide a completely accurate measure of which 'local' stations the system should be carrying." [22] The reason is not theoretical or conceptual, but empirical. Conceptually, the appropriate definition is whether viewers regard the station as local. The standard way to approach this conceptual definition is on the basis of viewers and advertiser behavior: what do viewers watch, and what constitutes a geographic market for advertising on commercial stations or for soliciting memberships for public television. Common practice in the industry is to regard the local market as approximated by the Area of Dominant Influence (ADI), which is defined as a contiguous group of counties that watches stations from one locality more than any other. Defining a station's local market as its ADI has the virtue that it is based on viewer behavior and is accepted as a mesure of markets by advertisers, not on arbitrary criteria that are unrelated to viewer and advertiser behavior.

26. Because audience measures are based on a statistical sampling technique and are likely to be inaccurate for low-rated stations and for small, specific geographic areas, and because the ADI measure deals with a large geographic unit (the county), another useful tool for defining local markets is the area within a station's Grade B contour. This area is defined by the distance the station's signal is predicted to travel and still be strong enough to be received by a rooftop antenna if there is no interven-

[20] Besen Declaration, p. 33.

[21] Besen Declaration, p. 34.

[22] Besen Declaration, p. 33.

ing obstruction or interference. This, too, is a reasonable basis for defining a market because it represents the viewers which, in theory, at least, the station can compete in the absence of cable television.

27. Dr. Besen, unhappy with Congress's choice of the ADI and the Grade B contour to define the local market for broadcast stations, proposes some changes. First, a commercial station has to be both inside the same ADI as, and within fifty miles of, the cable headend. Second, he alters the statutory definition of local noncommercial stations, most importantly by excluding stations that are more than fifty miles away but that have a Grade B contour that includes the cable headend.

28. These alterations can not be called a correction of an arbitrary congressional decision. Dr. Besen's "50 mile" requirement for both commercial and noncommercial stations reduces the number of stations regarded as local. It does this by simply over-riding the direct measures of the market: the commercial station's ADI (what viewers actually watch) and the noncommercial station's Grade B contour (what they could watch in theory if they so desired). Dr. Besen's definition draws the distance of 50 miles from the hat.[23] Why not 45, or 52? Or why not 35 (syndicated exclusivity) or 75 (sports blackouts), both of which have been used to define local areas in other cases? The only basis for 50 miles is that, once before, the FCC picked 50 miles as a criterion for defining local markets. Hence, this "correction" increases, rather than decreases, the arbitrariness of the definition of local.

29. Additionally, Dr. Besen apparently would go beyond some definition of local in developing criteria for must-carry requirements. In particular, he mentions giving "credit" for carrying nearby stations that are not in the ADI,[24] although his analysis of carriage shows that this would not have much of an effect, and imposing a threshold audience rating. Sometimes Dr. Besen uses a hypothetical threshold rating share of 0.5 percent,[25] and sometimes 2.0 percent.[26]

[23] In some western states, the FCC has permitted regional stations to serve very large but sparsely populated areas outside of major cities. In these cases, from the perspective of viewers, stations and advertisers, the local market is far larger than a circle of radius fifty miles.

30. To require a minimum audience threshold as part of must-carry requirements would be truly discriminatory against over-the-air broadcast signals. Very few cable networks would satisfy a threshold of two percent, and many would not satisfy the 0.5 percent requirement.[27] Obviously, on a cable system with 40 channels, the *average* audience share for all channels can be only 2.5 percent. And, given that the four major national networks command more than half of the audience, the average audience share of cable networks must be below two percent on any system of average or above channel capacity. Given the very low audience ratings of most cable networks, dropping an over-the-air station with a two percent share to replace it with the 25th cable network on the system is virtually guaranteed to reduce total viewing on that channel, to the detriment of consumer welfare in both cable and non-cable homes.

The Financial Health of Broadcasting

31. Dr. Besen observes that the number of over-the-air stations is growing, and that a new network (Fox) was organized during the prior period of an absence of must-carry rules.[28] Dr. Besen uses this information to

[24] Besen Declaration, p. 34.

[25] Besen Declaration, p. 43.

[26] Besen Declaration, p. 45.

[27] Some examples of cable household audience shares of cable networks are presented in my first declaration.

[28] Besen Declaration, "The Financial Health of the Broadcast Industry," beginning on page 70.

buttress his conclusion that the absence of must-carry rules does not threaten the financial viability of broadcast television. Of course, this analysis reflects the way counsel for the plaintiffs structured Dr. Besen's assignment. The question is not whether must-carry rules prevent the destruction of broadcasting, but whether they strengthen existing stations and accelerate the creation of new ones.

32. Before jumping to subjective conclusions about the wisdom of must-carry rules, the first step is accurately to characterize what, if any, effect cable television has had on the number of television stations and over-the-air networks. The new networks (Fox, Warner Brothers, UPN) have taken as affiliates the best available independent commercial stations. In the case of Fox, they concluded affiliation agreements with most of the VHF independents. These are not the stations that are most threatened by the elimination of must-carry rules.

33. The facts about the number of stations are that the rate of growth was much slower during the period when must-carry rules were not in force than it was when the rules were in effect. Likewise, Warner Brothers and UPN entered after the must-carry rules were reinstated. Moreover, the documents discovered in this case and cited in my first declaration show that many cable systems adopted a policy of not adding any new stations during the period when must-carry rules were not in place.

34. As a matter of economic analysis, the predicted effect of the unwillingness of cable systems to add new stations is that fewer stations would enter, and that is what happened. And, as Dr. Besen correctly points out, if there are fewer stations than would otherwise be the case, the number of viable networks is lower. To the extent that reinstating must-carry rules would lead to a faster rate of growth in television stations, the rules are also favorable to network creation. Thus, the history of the past fifteen years is consistent with the hypothesis that the absence of must-carry rules hinders the growth of over-

the-air broadcasting and the growth of viewing options for consumers.

Conclusions

35. The facts contained in Dr. Besen's declaration actually support the basic contentions of the Government in this litigation. He finds that, in the absence of must-carry rules, hundreds of stations will be dropped. Dr. Besen does not refute the notion that the effect of these drops will be to reduce the quantity and quality of over-the-air broadcasting. Instead, he dismisses these effects as unimportant, despite the presence of considerable evidence to the contrary.

36. Dr. Besen does deny that the reason for these drops is anticompetitive behavior by cable companies, and instead asserts that cable companies drop stations only when and if their customers prefer the cable network that is substituted for the dropped station. On this score, his analysis contains errors of economic reasoning and is at variance with most scholarly research. Cable is not a competitive industry that is forced by Adam Smith's invisible hand to provide the combination of prices and services that maximizes the welfare or consumers. Most objective scholarly studies and government studies disagree with Dr. Besen and conclude that cable is a monopoly, that its market power is durable, and that vertical integration causes some cable operators to distort their program carriage decisions.

37. Recent developments in cable, including the imposition of rate regulation to try to control excess profits and the rapid growth in cable advertising, have increased the incentives and opportunities for cable ssytems to discriminate against broadcasters in making carriage decisions. Dr. Besen makes no mention of the effects of cable rate regulation, and dismisses the effects of cable advertising because these revenues are a relatively small fraction of all advertising on television. As a matter of economic analysis, this latter argument is spurious.

38. Dr. Besen most assuredly does not show that the adoption of must-carry rules was without basis. Indeed, his own study, stripped of the assertions and rhetoric, provides such a basis: Congress could reasonably care that approximately ten percent of the over-the-air stations, two-fifths of UHF independents and one-fifth of non-commercial stations would be dropped. The basis for this fear is the universal finding in research on broadcasting that the quality and quantity of programs is positively associated with audience ratings, and the fact that many households do not subscribe to cable and so would be directly harmed if some over-the-air station disappeared or reduced their programming because of cable drops.

39. Although unnecessary to support its conclusions, Congress had a reasonable basis in the economics research literature to believe that the motive for dropping these stations was anticompetitive: to favor an affiliated cable network and to capture cable advertising revenues that would switch from weakened independents. Dr. Besen simply fails to address the extensive research literature and discovery evidence in this case that supports the conclusion that cable system program choices are distorted and that cable systems experience little effect from adding or dropping low-rated independent stations, noncommercial stations, or cable networks. And he mistakenly concludes that because cable advertising revenues are small compare to some other advertising outlets it follows that cable systems are uninterested in expanding these revenues.

40. On the basis of my review of Dr. Besen's Declaration, I find no reason to retract or to alter any of my analysis and conclusions that were submitted in my first declaration. Regardless of either Dr. Besen's or my views about whether reregulation of cable TV is good public policy, Congress obviously had a reasonable basis for concluding that must-carry rules would improve consumer welfare by producing a stronger system of over-the-air

broadcasting, and that in the absence of such rules cable systems would inefficiently discriminate against over-the-air stations.

June 14, 1995

/s/ Roger G. Noll
ROGER G. NOLL

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

TIME WARNER ENTERTAINMENT COMPANY, L.P.'S AFFIDAVITS IN OPPOSITION TO DEFENDANTS' AND INTERVENORS' SUMMARY JUDGMENT MOTIONS AND IN FURTHER SUPPORT OF ITS SUMMARY JUDGMENT MOTION

* * * *

June 16, 1995

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SUPPLEMENTAL AFFIDAVIT OF LAURENCE ZIPIN

STATE OF CONNECTICUT)
) ss.:
COUNTY OF FAIRFIELD)

LAURENCE ZIPIN, being duly sworn, deposes and states as follows:

* * * *

7. Also, advertising is not the only unregulated stream of revenue for cable. Pay-per-view and premium services are other much more significant sources of cable revenue that are not regulated. In fact, in 1994, pay-per-view, mini-pay and premium services accounted for 25.5% of TWC's revenues, more than five times as much as advertising. Given that advertising comprises 4.4% of Time Warner's cable system revenues and is about 6 times less significant than other unregulated streams of revenue, I cannot envision cable operators acting on the purported advertising incentive to disadvantage local broadcast stations merely because advertising in an unregulated revenue stream.

* * * *

10. Finally, in 1991 I made a presentation at Warner Cable entitled "Local Cable Advertising Sales: 1992 and Beyond". In that presentation I stated that on the subject of digital insertion technology that "It is estimated that prototypes will be available in 1992; with 1993/1994 as a probable horizon that would make a company-wide con-

version of technology possible." Experience has shown that this estimate was overly optimistic. As I stated in my last affidavit, currently only a small percentage of TWC's ad sales offices use this technology on an experimental basis. Even they only received the equipment within the past year. A company-wide conversion will not occur for another 3 to 5 years from now instead of the 1993/94 time frame that I had predicted in 1991. Even with that technology fully deployed, cable will still not sell an amount of advertising proportionate to its share of viewers, because of the dominance and natural advantages of broadcast television.

June 14, 1995

/s/ Laurence Zipin
LAURENCE ZIPIN

[Jurat Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SECOND DECLARATION OF STANLEY M. BESEN ON BEHALF OF PLAINTIFFS TURNER BROADCASTING SYSTEM, INC., ET AL.

I. Introduction

I have previously submitted a declaration in this matter that provides a conceptual and empirical economic analysis regarding the effect on the local television broadcasting system of the absence of must carry requirements.[1] Since that submission, I have reviewed the Defendants' memoranda in support of their motion for summary judgment, as well as the declarations and deposition testimony of the following Defendants' experts: Roger G. Noll, James N. Dertouzos, Jeffrey H. Rohlfs, John R. Haring, John Peterman, Tom Meek, and Richard Feldman. Based on that review and my own analysis, I find that the Defendants' experts have failed to provide the Court with any significant evidence to support the view that Congress could reasonably have concluded that a must carry requirement is necessary to maintain the availability of "Free TV" to non-cable television households. In this second declaration, I explain in detail why, in my opinion, the arguments and evidence offered by Defendants' experts do not permit the conclusion that the economic health of local television broadcasting is in genuine jeopardy and in need of the protections afforded by must carry. After carefully considering Defendants' submis-

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[1] See *Declaration of Stanley M. Besen on Behalf of Plaintiffs Turner Broadcasting Systems, Inc., et al.* ("Besen Declaration").

sions, I adhere to the conclusions in my original submission.

II. Conclusions

In my declaration, I concluded that the absence of must carry provisions would not present any current, near-term, or even longer-term danger to the availability of "Free TV" to non-cable households.[2] With respect to any near-term effects, my opinion was based upon an assessment of the extent to which the carriage of television broadcast stations by cable operators matched the viewing habits of non-cable households in 1992, when no must carry requirements were in effect. Using 1994 viewing data, I found that, even in the absence of must carry requirements, the local broadcast stations carried by the typical subscriber's cable system accounted for 98 percent of local broadcast television viewership in non-cable households.[3]

I also found that any station with at least one-tenth of one rating point—the lowest rating Nielsen reports—had a 90 percent chance of being carried by cable operators in the absence of must carry requirements.[4] Stations that were lightly viewed in non-cable households—those with between one-half of one percent and 2 percent of total broadcast television ratings—had a 66 percent chance of being carried.[5] Finally, even stations with *no* ratings as reported by Nielsen had nearly a one-third chance of being carried.[6]

These results clearly demonstrate that, even in the absence of must carry requirements, cable systems carried

[2] Besen Declaration, pp. 12, 85.

[3] Besen Declaration, pp. 5, 41.

[4] Besen Declaration, p. 42 and Exhibit 2.

[5] Besen Declaration, p. 43 and Exhibit 4.

[6] Besen Declaration, p. 42 and Exhibit 2.

what non-cable households tend to watch, and carried many stations that were only lightly, or imperceptibly, viewed by non-cable households. There is only one conclusion permitted by these results: the elimination of the must carry requirements today would have no effect on the financial viability, or the programming quality, of those stations that non-cable households watch, and many of those that they do not watch.

Only one of the Defendants' economics experts, Dr. Rohlfs, disputes my finding that the typical subscriber's cable system carries those stations that account for virtually all viewing in non-cable households and even carries a very large proportion of those stations without any measureable viewing in those households. As I discuss below, Dr. Rohlfs analysis is premised on factual and conceptual errors.

I also pointed out in my declaration that the evidence on carriage patterns in the absence of must carry requirements is inconsistent with Defendants' claim that competition between cable systems and local broadcast stations in the sale of advertising provides a significant incentive for cable systems to deny carriage of television stations.[7] Such claims ignore the subscriber revenue loss, and exaggerate the expected advertising revenue gains, to cable systems of dropping those stations that are highly valued by their subscribers. The evidence regarding cable operators' voluntary carriage decisions in the absence of must carry requirements demonstrates that those stations that are not carried are not watched to any significant degree, so that the failure to carry them cannot be explained by anticompetitive behavior in the advertising market.

I also concluded in my declaration that there is no basis upon which Congress could have predicted that in the longer-term (i.e., over the next five to ten years), the absence of must carry requirements would jeopardize

[7] Besen Declaration, pp. 56-61.

the availability of "Free TV."[8] Indeed, I noted that a number of trends—particularly the advent of direct-to-home satellite broadcasting and the longer-term increase in cable channel capacity—would *increase* the incentives for cable systems to carry local broadcast stations. Moreover, the virtually unbroken string of increases in the number of broadcast stations during must carry periods and non-must carry periods alike suggests that investors do not expect the absence of must carry requirements to diminish the profitability of the broadcast industry significantly, if at all.[9] The flourishing of the Fox Television Network during the recent non-must carry period is further evidence that must carry requirements are not required to maintain the availability of "Free TV" to non-cable households.[10]

Furthermore, I noted in my declaration that many television stations chose retransmission consent rather than must carry status, indicating that their owners believe that these stations are likely to be highly valued by cable subscribers.[11] These clearly are stations that would be carried in the absence of any must carry requirements, *even if the cable operator must pay directly for, or offer other consideration for, carriage.* Specifically, a survey by the National Association of Broadcasters revealed that 80 percent of all commercial broadcast stations chose retransmission consent with respect to at least one cable system in their television market. Moreover, the typical broadcast station chose to negotiate for retransmission consent with nearly two-thirds of the cable systems within its television market.[12]

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[8] Besen Declaration, pp. 65-69.

[9] Besen Declaration, pp. 70-75.

[10] Besen Declaration, pp. 77-79.

[11] Besen Declaration, pp. 49-50.

[12] "More Than 90% of Affiliates Choose Retransmission Consent," *TV Today* (July 19, 1993), Bates Nos. 3008112-119.

Based on this analysis, I concluded that there was no factual basis on which Congress could reasonably have found that must carry requirements were necessary for the continued viability of the over-the-air television broadcasting system, or that the absence of must carry would, in any significant way, affect the availability of "Free TV" to non-cable households.[13]

III. Defendants' Experts' Testimony and Response to My Analysis

The Defendants' economics experts have offered a number of theories, and some evidence that, they argue, demonstrate that must carry requirements are needed to protect the broadcast television system. In each case, I find the arguments to be either incorrect, supportive of Plaintiffs' case, or of no relevance to the question of whether "Free TV" is in jeopardy in the absence of must carry requirements. In many instances, the conclusions these experts reach are not supported by the evidence they provide.

First, it is important to note that Defendants and their experts, with the possible exception of Dr. Haring, no longer claim that the broadcast *system* would be in jeopardy in the absence of must carry requirements. Their much more limited claim now appears to be that *some stations* would be in jeopardy. However, my analysis shows that the stations that would be most affected by the absence of must carry requirements are those with very low viewing. Thus, the failure of these stations to be carried would have little effect on the broadcast television system and, more importantly, on the welfare of cable and non-cable television viewers.

Second, Defendants' experts cannot, and largely do not, rely on the evidence on carriage patterns during the recent non-must carry period, patterns that are dramati-

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[13] Besen Declaration, pp. 12, 84-85.

cally at odds with their predictions that non-cable households would be harmed in the absence of must carry requirements. My analysis of those carriage patterns shows that 90 percent of stations with any reportable rating, and 98 percent of stations with a broadcast television audience share of at least ten percent, were carried without must carry protection. Defendants' expert Tom Meek reports estimates of the number of stations dropped by cable systems in the absence of must carry, which, when properly evaluated, are entirely consistent with this evidence and the conclusions I have reached from it. His data, putting aside their limitations, indicate that during the non-must carry period between 1985 and 1992, the typical cable subscriber lost access to only one-fourth of one broadcast television station. Mr. Feldman's study of drops of public broadcasters shows a similar result.

Third, Dr. Rohlfs contends that I have overstated the non-cable household viewership share accounted for by the stations carried by a typical subscriber's cable system. As I explain below, Dr. Rohlfs' analysis is factually incorrect and conceptually flawed.

Fourth, Drs. Noll, Dertouzos, and Haring highlight projected increases in local cable advertising revenues to support their assertions that cable operators will have a growing incentive to exclude broadcast stations because those stations compete with cable operators in the sale of local advertising. They also argue that if the cable operator has an interest in one or more cable programming services, the operator will have an incentive to drop, or decline to carry, local broadcast stations. These experts conclude that must carry requirements are necessary to offset these alleged incentives of cable operators to exclude broadcast stations.

The Defendants' experts' conclusions regarding the effects of cable advertising growth and vertical integration on cable carriage of broadcast stations are incorrect be-

cause their logic is incomplete: they fail to account for the value that cable subscribers currently place on the programming of local broadcast stations, a value that these experts recognize. In addition, while they speculate about trends that they believe will (other things equal) affect the incentives for broadcast station carriage at some time in the future, these experts neither quantify the effects of these trends nor consider offsetting developments. Other than Defendants' experts' speculation, there is no evidence that trends towards cable system interconnects and clustering will have any effects in the future on the carriage of broadcast television stations. Moreover, other emerging trends, especially multi-channel competition, will result in increased incentives for carriage.

In addition to the failure to take into account the value that cable subscribers place on broadcast station availability, including their disregarding evidence on the carriage patterns of cable systems during recent non-must carry periods, Defendants' experts ignore credible evidence that was before Congress rebutting the argument that vertically integrated systems discriminate against unrelated program services.

In addition, Dr. Haring attempts to shift the Court's focus away from the Defendants' own allegations that cable operators have an anticompetitive incentive to exclude local broadcast stations in order to acquire market power in the sale of advertising by attempting to redefine the term "anticompetitive." Regardless of how one views this redefinition, however, the results reported in my declaration indicate that cable subscribers place such a great value on the highly viewed, and even many lightly viewed, local stations that cable operators will have strong incentives to continue to carry them.

Fifth, the various empirical analyses presented by Drs. Rohlfs and Dertouzos do not provide any persuasive evidence to support the conclusions they express. Dr. Rohlfs misinterprets and mischaracterizes his results regarding

the effects of drops on viewership of broadcast television stations. Dr. Dertouzos provides an incomplete analysis of current and future incentives of cable operators to carry broadcast stations.

Finally, when properly considered, Dr. Peterman's declaration does not demonstrate that the costs of must carry requirements are small.

To the extent that Defendants' rely on the analyses by, and conclusions of, their experts, their statement that "the extra evidence produced in remand proceedings, together with expert testimony, further substantiates Congress' reasonable conclusion that cable's gatekeeper status threatens the continued viability and vitality of a significant number of broadcasters, and that the must-carry provisions are an appropriate means of avoiding that risk" [14] misconstrues the evidence Defendants' experts have put forward. The Defendants' experts have not offered the Court any reliable empirical basis for a finding that Congress could reasonably have concluded that the availability of "Free TV" to non-cable television households would be substantially reduced in the absence of must carry requirements. The theoretical possibility of some incentives that may discourage some cable carriage of some broadcast stations does not mean such incentives are quantitatively important, nor that they will not be offset by other more important factors. The evidence I have offered in my declaration demonstrates, through analysis of actual carriage patterns, how unimportant those incentives—assuming they exist—are for cable carriage decisions.

IV. Rebuttal

A. Mr. Meek's Empirical Analysis

Defendants argue not only that the 1988 FCC carriage survey demonstrates that "when left to their own devices,

[14] *Memorandum of the United States and the Federal Communications Commission in Support of Their Motion for Summary Judgment* ("Government's Memorandum"), pp. 44-45.

local cable operators dropped, repositioned, or refused to carry significant numbers of local broadcast stations," but that the survey "substantially underestimated the scope of the carriage problems confronting local broadcast stations in the world without must-carry." [15] I explained in my declaration that the FCC survey ignored the much larger number of stations that *were* carried in the absence of must carry requirements, and that a later FTC Staff analysis of the same data showed that 98 percent of those stations that would have qualified for must carry status under the interim must carry rules were, in fact, carried.[16] The Defendants rely on an analysis by Tom Meek for the proposition that the FCC survey substantially understated the extent of non-carriage. For several reasons, I believe the Defendants' reliance on this analysis is in error.

To begin with, the analysis presented by Mr. Meek in his declaration is based on data compiled and maintained by Cable Data Corporation (CDC). These data, based on copyright filings made by cable systems, have many limitations, especially for the data on local station carriage.[17] Early on in my own analysis, I considered and rejected the possibility of using the CDC data given the availability of other alternatives.

Even ignoring the severe limitations of the CDC data, I believe that the results reported by Mr. Meek are misleading for two primary reasons. Much of Mr. Meek's analysis consists of counting stations that were "dropped," or not carried, by cable systems during the period 1985-1992. For example, he reports that, according to the CDC data, there were 3,473 instances of drops as of 6/30/88; 4,545 instances as of 6/30/89; and 7,945

[15] Government's Memorandum, p. 58.

[16] Besen Declaration, pp. 46-47.

[17] For a complete discussion of these limitations, see the Declaration of Greg Klein.

instances as of 6/30/92.[18] In terms of subscriber instances (drop instances multiplied by the number of cable subscribers affected), Mr. Meek reports 2.2 million subscriber instances as of mid-1985; 25.4 million subscriber instances as of mid-1988; and 46.3 million subscriber instances as of mid-1992.[19]

These figures by themselves are not very meaningful. For example, there is no analysis of *why* these stations were dropped, or whether they would even qualify for must carry status under the current statute. The results of my own analysis indicate that these are primarily stations with little or no viewing, even among non-cable television households.

A more helpful way to understand Mr. Meek's results is to put them into context using two other facts. First, Mr. Meek's own data show that over two-thirds of the instances of "drops" remained after the must carry requirements were imposed. That is to say, even as late as June 1994, the data continue to show significant numbers of "drops". The most reasonable conclusions about these "uncured" drops is that they either represent errors in the data or stations that in fact do not qualify for must carry status. Thus, these uncured drops should be subtracted from Mr. Meek's counts because they are not protected by the must carry requirements.

For example, Mr. Meek reports 46.3 million subscriber drop instances as of mid-1992, but 31.2 million subscriber drop instances as of mid-1994. Apparently, two-thirds of the subscriber instances were not cured by the current must carry requirements. Subtracting these from the 46.3 million subscriber instances leaves only 15.1 million subscriber drop instances as of mid-1992.

Second, the absolute numbers of drop instances must be understood in the context of the universe of possible

[18] Meek, ¶¶ 10, 12 (pp. 6, 7).

[19] Meek, ¶ 51 (p. 25).

drop instances. According to Mr. Meek's declaration, there were approximately 56.5 million cable subscribers in the U.S. as of July 1992.[20] If the typical cable subscriber had access to eleven broadcast television stations,[21] the total number of possible subscriber-station instances is 621.5 million. In other words, Mr. Meek finds 15.1 million net subscriber drop instances out of a possible number of about 621.5 million, or 2.4 percent. Put differently, the typical cable subscriber lost access to only about a fourth of a station (2.4% of 11 stations = 0.27 stations) that would have otherwise been protected by the current must carry requirements.

Mr. Feldman's declaration reports the results of his analysis of cable system drops of public television stations. The study, conducted using the same basic data set and methodology as Mr. Meek, concludes that, from 1985 through the end of 1992, 314 public television stations were dropped, representing over 10.6 million "subscriber drops."[22] However, his data show that, by the first half of 1994, there were still 7.4 million subscriber drops apparently uncured by the imposition of must carry, thus leaving only 3.2 million subscriber drops. Since these are effectively a subset of the 46.3 million subscriber drops reported by Meek, the result remains that the typical subscriber lost access to a very small fraction

[20] Meek, Attachment O.

[21] According to the results of the (1995) FCC carriage survey as summarized by Dr. Peterman, the subscriber-weighted average number of broadcast stations carried per cable system is 11.08 (6.70 must-carry stations and 4.38 retransmission consent stations). See Peterman, Exhibit 2. Other sources have reported lower numbers. For example, the 1990 GAO *Follow-Up National Survey of Cable Television Rates and Services* reports 8.9 channels available to the average cable subscriber on 12/31/89 (Appendix V, p. 79). Using that figure, the total number of subscriber-station instances is 502.9 million, of which the 15.1 million drops reported by Mr. Meek represents 3.0 percent.

[22] Feldman, ¶¶ 11-12 (p. 4).

of a public broadcast television station between 1985 and 1992.

The Meek and Feldman studies contain the same flaw as did the 1988 FCC carriage survey. That is, they focus only on the number of instances of stations that were dropped in the absence of must carry requirements and ignore the much larger number of stations that were carried. To that degree, the NCTA and FTC Staff responses to the 1988 FCC survey apply equally to the Meek and Feldman studies. It remains the case that: (i) most of the stations that would qualify for must carry were carried even in the absence of must carry, so that instances of non-carriage were relatively rare; and, (ii) most instances of non-carriage are explained by the remoteness of the station, by network duplication, or by extremely low viewership among cable and non-cable homes.

When combined with the evidence, presented both in the NCTA and FTC critiques of the FCC survey and in my own declaration, that the stations that are not carried are primarily very lightly or imperceptibly viewed (and nearly a third of the imperceptibly viewed stations are carried voluntarily), Mr. Meek's and Mr. Feldman's results are unpersuasive in demonstrating that the local broadcasting system would be in jeopardy in the absence of must carry requirements.

B. Rohlfs' Critique of Viewing Share Calculation

As the Court is aware, like all experts I provided Defendants an expert report in April, but by declaration was submitted on May 25. At the time of the expert report, I used 1994 Nielsen data for all television households as reported by Broadcasting Investment Analysts, Inc. (BIA). I also reported at the time that I had just received more complete 1994 Nielsen data upon which my declaration would be based. Defendants now suggest that the results shown in my April expert report are in error, based on a criticism of my application of BIA data made by Defendants' expert, Dr. Rohlfs.[23] His criticism is factually irrelevant because my declaration is not based on that data and, in any event, it is conceptually flawed.

In April, I reported that, based upon BIA data, the stations carried by the typical subscriber's system in the absence of must carry requirements accounted for about 99 percent of all local broadcast station viewership.[24] Because the BIA rounds share estimates to the nearest whole percentage, the smallest non-zero share it reports is one percent.

Because BIA reports only rounded audience shares, Dr. Rohlfs' asserts that significantly less than 99 percent of total viewership is accounted for by the stations that are carried by the typical subscriber's system. According to Dr. Rohlfs, this is because the local stations not carried were ascribed a zero share by BIA, although they in fact likely had some viewing. Dr. Rohlfs claims that 94 percent rather than 99 percent is a better estimate of the viewership share accounted for by the stations carried by the typical subscriber's system *not* by calculating actual shares but by arbitrarily assigning a share of one-quarter of a percentage point to all of the stations that were not carried and that he claims were assigned a zero share by BIA.[25]

Dr. Rohlfs' statement is factually irrelevant and conceptually flawed. As indicated above, my declaration, i.e., my actual testimony, reported results based on Nielsen data that had only become available to me just prior to the submission of my April expert report and that were not analyzed as part of my report. These data allowed me to calculate shares for any station that had ratings of as low as one-tenth of one percent in non-cable house-

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[23] Government's Memorandum, p. 62.

[24] *Expert Report of Stanley M. Besen on Behalf of Plaintiffs Turner Broadcasting System, Inc.* ("Besen Expert Report"), p.4.

[25] Rohlfs, ¶ 38 (p.20).

holds. That is, if as few as one-tenth of one percent of all non-cable television households were watching a particular station, I employ a non-zero viewership share for that station. My revised share calculations based on unrounded data are virtually identical to the share calculations based on rounded (BIA) data in my expert report. Ninety-eight percent of all viewing is accounted for by the local stations carried by the typical subscriber's cable system.[26] Dr. Rohlfs' is simply wrong in his conjecture that I have substantially overstated the percentage of viewing accounted for by the stations that are carried.

Dr. Rohlfs reaches an erroneous conclusion because his methodology is conceptually flawed. Although the reported shares of some of the non-carried stations were rounded down, from (say) a "true" share of four-tenths of a percentage point ot zero, the same collection of non-carried stations also contains stations whose shares were rounded *up*, from (say) a "true" share of six-tenths of a percentage point to one percent. In general, one would expect the effects of rounding down the shares of some stations to be offset by the effects of rounding up the shares of others. As a result, one would not expect my calculated figure to change by much, if at all, in the absence of rounding. My analysis of the unrounded Nielsen data has confirmed this to be the case.

C. Cable Operator Incentives for Non-Carriage

1. Advertising Incentives

Featured prominently in Defendants' legal memoranda and their experts' declarations is the argument that, because cable operators and broadcast stations compete in the sale of advertising, there exists an incentive *at the margin* for cable operators to drop, or to refuse to carry, some broadcast stations. In Defendants' view, Congress properly took this incentive into account in adopting the must carry requirements. Defendants also contend that

[26] Besen Declaration, p.41 and Exhibit C-2.

this incentive is growing due to the increasing importance of advertising to cable operators, and that Congress had substantial evidence to that effect.[27]

While it is undeniable that cable operators have an incentive to increase their advertising revenues, that fact is not sufficient to permit the conclusion that local broadcasting would be in jeopardy without must carry requirements. Most importantly, the Defendants' experts consistently ignore two critical facts. First, they ignore the fact that the failure to carry any significant number of the stations that cable subscribers value would result either in a reduction in subscribership or a reduced willingness by viewers to pay for cable subscriptions. Second, they ignore other trends that will encourage the carriage of local stations. Furthermore, they provide no evidence or analysis to indicate that the incentive for cable systems to drop broadcast stations will become significant in the future.

To appreciate the weak conceptual and empirical bases on which the Defendants' experts base their predictions of widespread harm to non-cable households, consider the following statement by Dr. Noll:

> Although advertising sold by both cable networks and cable systems still accounts for only a few percent of total television advertising, its rapid growth and potential for still further growth creates an important incentive for cable systems to drop over-the-air broadcast channels in the absence of must-carry requirements.[28]

[27] See, for example, Noll ¶ 14, ¶ 24; Dertouzos ¶ 5; and, Haring ¶ 46.

[28] Noll, ¶ 15. Similarly, Dr. Dertouzos claims:

> The [advertising] incentives on the part of operators to suppress local broadcast competition can be expected to increase over time, thereby making must carry requirements even more important in the future. (Dertouzos, ¶ 5)

Similarly, Dr. Haring asserts that:

One quesion raised by claims such as these is which stations these experts think will be harmed by the absence of must carry requirements. Another is when they believe that harm will occur.

In his declaration, Dr. Noll is at least ambiguous with respect to those stations that he believes would be at risk in the absence of must carry requirements. While he states that network affiliates and primary PBS stations are not at risk, his declaration never specifies those stations that he believes would be at risk. However, under questioning in his deposition, Dr. Noll makes clear that, whatever the relevant time frame, the stations most at risk are those UHF stations with the lowest ratings.[29] Dr. Dertouzos seems to agree when he describes the reduced competition from "broadcasters with weak signals" that would result from the elimination of must carry requirements.[30]

I believe that the opportunity costs of carrying broadcast stations are rising for cable system operators as cable *increasingly* competes for advertising sales, and new, substitutable, cable networks offering additional revenue streams become available. (Haring, ¶ 19)

[29] In the course of making statements such as these, Dr. Noll occasionally mischaracterizes my analysis. Dr. Noll asserts that my data reveal that a number of UHF stations were "dropped" by cable operators in the absence of must carry. Dr. Noll's language makes it appear that cable operators were carrying all local broadcast stations during some unspecified must carry period and then dropped those stations following the vacating of the must carry requirements. In fact, the data sources I used report which local stations cable operators carried and which stations they did not carry in 1992. It is erroneous to infer that all of those stations that were not carried in 1992 had previously been carried and then were dropped. Indeed, as discussed above, when one considers the Meek analysis properly, the extent to which stations were dropped by cable systems during the most recent non-must carry period is very small relative to the number of stations those systems did carry.

[30] Dertouzos, ¶ 6.

I can find only one way to interpret the characterizations of Drs. Noll and Dertouzos of the at-risk stations: regardless of when the effects of the absence of any must carry requirements would be felt, those stations that would be at risk are those that fail to attract significant viewing in non-cable households. The stations watched by non-cable households would not experience significant, if any, harm in the absence of must carry requirements.

Of course, there is no inconsistency between my conclusion that the stations carried by the typical subscriber's cable system account for virtually all viewership in non-cable households and the Defendants' experts' claim that some stations will not be carried. What these experts appear to be arguing is that *every* station should be carried by cable operators because the loss of *any* station harms non-cable households, regardless of how little those households actually watch those stations.

In defending this position, Dr. Noll seems to suggest that ratings are a poor indicator of the value to viewers of lightly viewed stations.[31] However, it surely is not the case that all stations that are lightly viewed, or have no Nielsen-reported ratings, have substantial value to non-cable households. While viewership may not be a perfect proxy for this value, it does provide some useful information regarding the value that non-cable households place on individual local stations. Presumably, that is why the Defendants have expended so much effort in demonstrating the effect of non-carriage on a station's ratings.

The Defendants' economics experts have provided absolutely no evidence in support of their assertion either that lightly viewed stations are nonetheless highly valued by

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[31] At other times, he suggests the opposite, as when he contends that the ratings of some non-carried stations are higher than some carried cable services.

non-cable households, or that the loss to non-cable households from non-carriage (if it were to occur) would represent a significant proportion of the value that non-cable households place on local stations. Because Drs. Noll and Dertouzos agree that all network affiliates and primary PBS stations will continue to be carried into the indefinite future—and even Dr. Haring believes they are likely to be carried for the next five years—one could easily infer that the loss of those stations that would not be carried in the absence of must carry requirements—stations that are lightly or imperceptibly viewed—would have little effect on the total value placed on local stations by non-cable households.

In any event, there is no need to resolve this debate at a conceptual level. In the absence of must carry requirements, nearly one-third of all stations with *no* rating and more than half of those stations with a viewership share of less than 2 percent were in fact carried by cable operators. Thus, in the absence of must carry requirements, cable operators carried most of the stations about which Dr. Noll expresses concern, apparently because those stations are valued by cable subscribers.

Defendants' experts claim that the significant driving force behind the incentive not to carry broadcast stations is that cable operators desire to increase their advertising revenues. These same experts emphasize that advertising revenues are substantially dependent on viewership. Yet these experts also claim that the stations that are most at risk are those with very low ratings, the very stations for which the increase in advertising revenues that would be experienced by the cable operator if they were not carried would be trivial.

Moreover, as I observed in my declaration, cable services with local advertising availabilities account for only about 25 percent of cable household viewing. Thus, most of the trivial amount of viewing accounted for by the "excluded" lightly-viewed stations is likely to be captured

by other broadcast stations, by cable services that do not provide local advertising availabilities, or will simply be lost because cable households reduce their viewing. In short, there is no reason to believe that lightly-viewed stations are not carried because of a cable operator's desire to enhance its advertising revenues at their expense.

The FTC Staff's reply to the FCC's 1988 carriage survey makes many of these same points. The evidence showed, in its view, that "most systems did not deny carirage to any of their former must-carry stations, indicating either that cable market power in advertising markets is absent, or that the likely decrease in audience size and profits from carriage denial is large relative to any anticompetitive gains in advertising revenue (footnote omitted)." [32] Further, the Staff noted, "when carriage denial did occur, it often involved stations that either did not sell advertising or that accounted for only a trivial share of the total television market." [33] In regard to the fact that many carriage denials involved distantly located network affiliates, the Staff observed that "dropping distantly-located stations seems inconsistent with the advertising monopoly hypothesis; a desire to restrict the quantity of advertising time in a cable system's own market would lead it to deny carriage to a local station, not a remote one." [34] Finally, the Staff noted that many carriage denials "involved commercial independent stations that tended to have very low audience shares even when they were entitled to must-carry status. Again, this behavior is inconsistent with the advertising monopoly hypothesis. Denying carriage to stations that viewers seldom watch is not a promising anticompetitive strategy for

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[32] *Reply Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission* ("FTC Staff Report"), MM Docket No. 90-4, November 26, 1991, p.23.

[33] FTC Staff Report, p.23.

[34] FTC Staff Report, p.24.

reducing advertising output."[35] This analysis was, of course, available to the Congress in 1992.

The second issue is *when* these experts think that the effects of the absence of must carry requirements will be felt. Drs. Haring, Dertouzos, and Noll assert that at least some lightly viewed stations will be dropped immediately. Drs. Noll and Dertouzos believe that this trend will become more important at some time in the unspecified future. Taking the most extreme view, which seems to be shared by no one, Dr. Haring believes that within ten years, cable operators will begin to drop network affiliates.

The evidence I have presented in my declaration indicates that there is no near-term danger to those stations that account for virtually all viewing by non-cable households. In the absence of must carry requirements, those stations carried by the typical subscriber's cable system accounted for 98 percent of all viewership in non-cable households. Ninety percent of all stations with ratings of at least one-tenth of one percent and nearly one-third of the stations with ratings of less than one-tenth of one percent are willingly carried by cable systems. Because of the high value that cable subscribers apparently place on the carriage of local broadcast stations, the carriage patterns that I described in my declaration are unlikely to change in the near term in the absence of any must carry requirements.

In my declaration, I also noted corroboration for this conclusion. Specifically, a survey by the National Association of Broadcasters revealed that 80 percent of all commercial broadcast stations chose retransmission consent status with respect to at least one cable system in their television market. And the typical broadcast station has chosen to negotiate for retransmission consent with nearly two-thirds of the cable systems within its television market. The choice of retransmission consent status indi-

[35] FTC Staff Report, pp. 24-25.

cates that the owners of these stations believe that their stations are likely to be highly valued by cable subscribers. These clearly are stations that would be carried in the absence of any must carry requirements, *even if the cable operator must pay directly for, or offer other consideration for, carriage*. In addition, my declaration described a research report indicating that cable subscribers placed greater value on network affiliates, public television stations and independent stations than on many, if not most, cable programming services.[36]

In short, the absence of a must carry requirement can be expected to have little or no near-term effect on those stations that are watched by non-cable households. Cable operators will continue to carry most local stations because they are highly valued by their subscribers, and operators will carry many stations that have no Nielsen-reported viewership.

Of course, as the passage from Dr. Noll's declaration at the beginning of this section suggests, the Defendants' experts assert that, because local cable advertising revenues are expected to grow over time, the need for must carry requirements will be even more significant in the future. Even if the premise of this assertion is correct, the conclusion that the need for must carry will increase in the future is a *non sequitur*.

That cable operators' advertising revenues are increasing is one trend among many, and the implications of this trend for local station carriage are not likely to be nearly as significant as other trends. In my declaration, I described a number of factors that in my judgment would more than offset the cable operators' alleged advertising-related incentives to exclude local broadcast stations. I

[36] Norman Hecht Research, Inc., *Cable Subscribers' Valuations of Broadcast and Cable Channels on Two Cable Systems*, April 1993 (Bates Nos. 4009915-9925).

noted the growth of other multichannel competitors as a factor that would encourage the local station carriage by cable systems. In its *1994 Competition Report*, the FCC reached a broadly similar conclusion:

> the entry of competitors to local cable systems over the coming months and years should exert a significant, favorable effect on market conduct and performance.[37]

With respect to broadcast station carriage, the effects of that new competiton are already being felt. Specifically, I described in my declaration how cable operators have already begun informing their subscribers that, unlike cable systems, the new direct-to-home satellite services cannot offer their subscribers local broadcast stations. Similarly, in soliciting carriage of its affiliates by cable operators, the new United Paramount Network has argued that cable's ability to offer subscribers local broadcast stations gives it a distinct competitive advantage over other multichannel alternatives.[38]

Finally, the behavior of investors in broadcast stations and networks is completely inconsistent with the Defendants' prediction of their near-term or longer-term jeopardy. Specifically, investors in broadcast stations and in the Fox Network during the most recent non-must carry period incurred substantial sunk costs in the development of long-lived station and network assets, both tangible and intangible. These expenditures would not have been incurred if the absence of must carry requirements was

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[37] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, CS Docket No. 94-48, 9 FCC Rcd 7556.

[38] Bates No. UPN 000056 ("UPN Provides Cable with Advantages over Satellite and Wireless Competitors"; "UPN stations are rarely carried by satellite and wireless systems"; "Only cable can combine satellite and broadcast services.").

expected to wreak financial havoc with the broadcasting industry.

2. Vertical Integration Between Cable Operators and Cable Programming Services

Defendants' economics experts assert in their declarations that the degree of common ownership between cable operators and programming services will also discourage the carriage of local broadcast stations. Defendants also argue that evidence documenting an incentive to favor vertically integrated services was before Congress and that Congress properly considered and relied on it. For example, Dr. Noll refers to the "extensive" degree of vertical integration in the cable industry and predicts that vertical integration will lead vertically integrated cable operators to "favor" their owned services at the expense of other services, including broadcast stations.[39, 40]

Dr. Noll's theory at the very least is incomplete because he ignores the high value that cable subscribers place on those stations most watched by non-cable households. Because of this omission, the prediction of his theory is flatly contradicted by the facts. My analysis shows that, in 1992, when the degree of vertical integration was nearly

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[39] Noll, ¶¶ 15, 18.

[40] Dr. Noll aserts that, consistent with the classic Steiner model, vertically integrated cable monopolies in theory will carry too *few* duplicative broadcast services, thereby harming both cable and non-cable households. This description turns the Steiner model on its head. In that model, the excessive programming duplication that tends to result with advertiser-supported over-the-air broadcasting is viewed as harmful to consumers. This is because broadcasters care only about how many viewers they attract with a program, rather than the value that viewers place on the program. In a world with just over-the-air advertiser-supported television, broadcasters may find it more profitable to offer duplicative programming even if viewers place little value on that duplication.

as extensive as it is today,[41] the typical subscriber's cable system carried broadcast stations that accounted for 98 percent of the viewership in non-cable households, and also carried many stations whose ratings were less than one-tenth of one percent. In addition, the statistical analysis reported in my declaration is inconsistent with Dr. Noll's prediction.

Moreover, there were, in fact, empirical studies placed before the FCC and Congress that showed no discrimination by vertically integrated cable operators against unaffiliated program services. For example, a study by Benjamin Klein on vertical integration in the cable industry found that vertically integrated cable operators are more likely non-integrated systems to carry *both* affiliated *and* unaffiliated program services.[42] That is, vertically integrated systems simply tended to carry more services in total. The study found no evidence of discrimination against unaffiliated program services.

Using one of Dr. Noll's own sources, Drs. Owen and Wildman (one of Dr. Dertouzos' frequent co-authors) review a number of studies of the effect of vertical integration and conclude that

> [Telecommunications, Inc. (TCI)] does not appear to discriminate against networks in which it has no ownership interest. This finding has strong implications for other systems. If TCI, one of the largest

[41] In its *1994 Competition Report*, the FCC found that

> Vertical integration in the [cable] industry (i.e., the ownership of program services by MSOs) was approximately the same in 1994 as in 1990.

Notice of Inquiry In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61, (adopted May 4, 1995), ¶ 16.

[42] Benjamin Klein, "The Competitive Consequences of Vertical Integration in the Cable Industry," Department of Economics University of California, Los Angeles, June 1983 (Def. Exh. 416).

> and most vertically integrated MSOs, does not discriminate, it is unlikely that other vertically integrated MSOs could find it profitable to do so.[43]

In addition, Dr. Noll does not fully describe one of the more recent studies of "favoritism" on which he relies. Specifically, he characterizes the Chipty study in the following way:

> Chipty undertook the ambitious tasks of considering choices among all types of cable networks, and produced broadly similar findings [of favoritism]. [Footnote omitted.] [44]

Dr. Noll fails to inform the Court that in fact Chipty found an effect of vertical integration for only two program categories of cable programming services, music video services and home shopping services. He also fails to tell the Court that the differences between the carriage rates of systems affiliated with one of these types of services and other systems is quite small. For music video services, Chipty finds that affiliated systems carry 0.2 fewer music video services than unaffiliated systems; the corresponding number for home shopping services is 0.15. Finally, Dr. Noll does not mention that for all other cable programming service categories—accounting for 92 percent of all the services in her sample—Chipty apparently found *no effect* of ownership affiliation on the number of services carried.

Moreover, none of the Defendants' economics experts suggests that the extent of vertical integration will increase over time. Indeed, the 1992 Cable Act's limitations on

[43] Bruce M. Owen and Steven S. Wildman, *Video Economics* (1992), p.250.

[44] Tasneem Chipty, "Vertical Integration and Its Effects on Unintegrated Rivals: Evidence for the Cable Television Industry," Department of Economics, Ohio State University, September 1993 (Def. Exh. 418).

the number of channels that can be occupied by vertically integrated cable services, and its limitations on program exclusivity and other contractual terms, will tend to discourage operator-programmer ownership ties. Thus, recent history of carriage patterns when vertical integration is "extensive" is a reasonable indicator of future carriage behavior.

Finally, if vertical integration were the problem, which it factually is not, then the must-carry requirements in the Cable Act are too broad in one dimension, because they apply to all cable system owners whether or not they are affiliated with cable program services, and too narrow in another, because they apply only to broadcast stations and not to other non-integrated programmers.

3. Dr. Haring's "Anticompetitive" Rationale for Must Carry Requirements

Congress expressly grounded its must carry statute on its finding that there existed an anticompetitive incentive for cable operators to exclude broadcast stations from their channel lineups for the purpose of acquiring market power in the sale of local advertising. As I noted in my declaration, and as described in the previous section, any such incentive is likely to be small or non-existent. To the extent that cable operators do not carry local broadcast stations in the absence of must carry requirements, the stations that are not carried tend to be those that have no Nielsen-reported ratings, and even then, nearly a third of those stations are carried. The failure to carry stations with imperceptible viewership shares, and therefore imperceptible shares of local television advertising revenues, cannot provide cable operators with market power in the sale of advertising. A simpler and more plausible reason why those stations are not in fact carried is that cable subscribers place little value on them. Because the local stations carried by the typical subscriber's system account for virtually all of the viewing in *non-cable* households,

non-cable households apparently place little value on those stations as well.

In his declaration, Dr. Haring attempts to shore up Defendants' allegations of anticompetitive incentives by redefining the meaning of "anticompetitive." Specifically, he states that the cable operator's decision as to whether to carry any particular local broadcast station is flawed by an "externality," which he claims is remedied by the must carry requirement.

> Because non-cable households are external to cable systems, cable operators will quite naturally pay little or no attention to the interests and well-being of those non-cable households . . . From an economic perspective, the appropriate response to this 'externality' problem is to internalize the externality, and that is precisely what the must carry requirement does by defining a right of carriage for over the air broadcasting . . . [T]he must carry requirement is a precise means for responding to the problem that Congress identified—ensuring that the true public demand for a "free" service, particulary the demand by 40 percent of American TV households who cannot or do not subscribe to cable, is adequately reflected in cable carriage decisions.[45]

Dr. Haring alleges that my expert report only considered whether there was any "narrow" anticompetitive theory (i.e., the usual and customary approach to market power issues in antitrust economics) on which Congress could have reasonably premised its must carry requirement.[46] Therefore, because I did not consider this new, broader definition of "anticompetitive" cable operator behavior that encompassed this externality, Dr. Haring asserts that I "jumped" to the wrong conclusion.

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[45] Haring, ¶¶ 11-13, 16.

[46] Haring, ¶¶ 7-9 (pp.3-4).

First, it is important to observe that the definition of "anticompetitive" that Dr. Haring now attacks (i.e., the one customarily recognized by antitrust experts) is the one that has been put forth by the *Defendants* in this proceeding and which continues to be used by the Defendants' experts in their expert reports and declarations.

More important, however, Dr. Haring's externality theory does not withstand scrutiny, for two main reasons. First, my analysis of carriage patterns during the non-must carry period shows that his theory lacks practical significance. If cable operators behavior adversely affects the interests of non-cable households, we would not expect to see cable carriage of those stations that are watched by non-cable households. In fact, stations carried by the typical subscriber's cable system account for *virtually all* of the viewing by non-cable households. The local stations that non-cable households want to watch are the same local stations that cable households want to have on their cable systems. Cable operators know that they will lose subscribers—and profits—if they fail to carry those local stations, and as a result cable operators carry the same local stations that non-cable households watch.

Moreover, Dr. Haring fails to note an important *positive* externality that would be substantially reduced if the must carry requirement were upheld. It is widely recognized that one of the defects of the advertiser-supported television system is that it results in the provision of programming that is most highly valued by *advertisers*, not the programming that is most highly valued by *viewers*. Under a system of advertiser support, broadcast stations will carry those programs that attract the largest possible audiences, even if viewers place a relatively small value on the programs.

As I indicated in my Declaration, cable overcomes this problem by permitting cable viewers to obtain highly valued programming by paying directly for it. Although the primary beneficiaries are cable subscribers, non-cable

households benefit as well *if local broadcasters must compete for carriage on cable systems.* This is because, in the absence of must carry requirements, local broadcasters will provide programs that are valued by cable subscribers in order to induce cable operators to carry their stations.[47] But non-cable households also benefit from this behavior if they value the same programs as do cable subscribers. However, this incentive for local broadcasters to carry programs that are valued by viewers will be reduced if cable systems are required to carry all local broadcasters because then those broadcasters do not have to provide the programming that viewers (as opposed to advertisers) value in order for them to be carried. In short, the existence of must carry requirements reduces the incentive for local broadcasters to provide the programming that their *viewers* value most highly.

Third, as suggested by the excerpt from his declaration, Mr. Haring apparently believes that the viewing preferences of the 40 percent of homes passed by cable that do not subscribe to cable do not count at all in the cable operator's carriage decisions. However, there will always be some subscribers who are on the verge of becoming non-subscribers and some non-subscribers who are on the verge of becoming subscribers. In their carriage decisions, cable operators consider not only the effects on current, satisfied subscribers, but also on those subscribers on the verge of leaving the system and those non-subscribers on the verge of becoming subscribers. In this way, cable operators do take into account the preferences of non-subscribers.

Finally, if the Defendants and their economics experts meant to indicate only the presence of an externality when they used the adjective "anticompetitive," then the Defendants' contention that cable operators have an incentive to "exclude" broadcast stations is a much weaker one.

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[47] This does not mean, of course, that the interests of advertisers will be ignored.

To the extent that there is no anticompetitive (in the usual and customary sense) increase in the price of local advertising because of the alleged exclusion, then the incentive to exclude will be smaller.

In summary, if the Court were to accept Dr. Haring's redefinition of anticompetitive, then it follows that the operator's alleged incentive to exclude broadcast stations in the absence of must carry requirements is even weaker than the Defendants originally attempted to lead the Court to believe. Moreover, notwithstanding Dr. Haring's externality theory, the actual behavior of cable operators in the absence of must carry requirements shows that the theory has no practical significance. Non-cable households watch the same local stations that are carried by cable operators, so that their preferences are effectively taken into account by cable operators when they make their carriage decisions.

D. Dr. Rohlfs' Empirical Analysis

In a reference to Dr. Rohlfs' empirical study, Defendants state that "the cable drops analyzed in Dr. Rohlfs' study caused harm to 10 to 13 million households in a typical week." [48] Not only does the statement omit a very significant qualifier that Dr. Rohlfs attaches to the statement (that the harm was caused only to the extent that cable drops caused the quality of over-the-air programming to decline,[49] an issue that Rohlfs' study does not address), but it repeats Rohlfs own mischaracterization of his results.

Dr. Rohlfs' declaration sets out his analysis of the effects of cable drops/adds on the viewership of a broadcast station. His basic result, which is hardly surprising, is that when a station is dropped from a cable system its viewer-

[48] Government's Memorandum, p.71 (footnote 141).

[49] Rohlfs, ¶ 6 (p.4).

ship among subscribers to that cable system declines.[50] Nonetheless, Dr. Rohlfs has vastly overstated the extent to which his results demonstrate ". . . harm to a significant number of households." [51] In addition, there is substantial reason to believe that the quantitative significance of his results cannot be generalized to the cable universe.[52]

Dr. Rohlfs begins his analysis with the CDC data set used extensively by Mr. Meek for the study described in his declaration. This data set includes nearly 7,500 instances of "drops" of broadcast stations by cable systems during the period 1984-1992. After applying a variety of screening criteria, and then dealing with some data problems, Rohlfs is left with only 89 cases in which: (1) the drop was by a cable system that had at least 3,000 subscribers, and whose subscribers accounted for at least 30 percent of the county's television households; (2) all cable systems in that county serve only that county; (3) the county was in the same ADI as the broadcast station; and (4) both the broadcaster and the county were in the lower-48 states.[53] Moreover, Rohlfs employs only 59 of the 89 cases in his statistical analysis, since the remainder were unusable because the stations' ratings were zero for all years[54], a fact that is consistent with the evidence I have reported on the viewing of non-carried stations.

Not only do many of the stations in Dr. Rohlfs' sample have no reportable viewing, so that failure to carry them will not adversely affect viewers, but Dr. Rohlfs' analysis likely overstates the harm to viewers for a second reason.

[50] Rohlfs, ¶ 6 (p.4).

[51] Rohlfs, ¶ 6 (p.4).

[52] See the rebuttal declaration of Linda McLaughlin for a detailed analysis of the robustness of Dr. Rohlfs regression models.

[53] Rohlfs, Exhibit C.

[54] Rohlfs, ¶ 25 (p.14).

Because 36 of the 89 station/county combinations—and 31 of the 59 actually used in Dr. Rohlfs' regression analysis—involved affiliates of either ABC, CBS, NBC, or Fox, and cable systems almost always carry at least one affiliate of each network, cable subscribers will still have access to these program sources even if particular stations are dropped.[55] Analysis of the 36 "drops" of duplicate affiliates occurring in Rohlfs' sample confirms that 25 of the 36 systems—and 21 of the 31 actually used in the regression analysis—were carrying another station affiliated with the same network.[56] (See Exhibit 1).

Consequently, even if viewership among cable households fell for the particular network affiliates that were dropped by a cable system, it is almost certain that cable subscribers (and non-cable households, for that matter) still had access to the programming provided by that network. Any reported drops in viewership for these stations among the cable households do not reflect any harm to non-cable viewers.

Dr. Rohlfs' also indicates that the stations in his sample (presumably the 89 rather than the 59 that he actually uses) serve television markets that had 27 million TV households. From this, he concludes that, "To the extent that cable drops cause the quality of over-the-air programming to decline, 10 to 13 million households were harmed in a typical week by the drops assessed in this study." [57] This is the result of multiplying, for each station-county combination, television households in the entire television

[55] Recall that there is no requirement to carry duplicate network affiliates under the current must carry statute.

[56] In four of the remaining cases, the *Factbook* showed the supposedly "dropped" station as being carried in that and subsequent years, again calling into question the validity of the CDC data. In the seven remaining cases, the stations were evidently voluntarily added to the system's lineup prior to the reimposition of must carry requirements.

[57] Rohlfs, ¶ 6 (p.4).

market by net weekly circulation in the county, and then adding up the results.

In this calculation, Rohlfs is simply counting the number of television households that could *potentially* be affected by a change in the dropped stations' programming quality. This is not a meaningful measure of harm, since the calculation does not take into account *by how much* these households would be harmed, if at all. To determine the extent of harm requires the answers to two questions: First, by how much is program quality reduced as a result of the drop? Second, for a given reduction in program quality, how much are viewers affected?

The effect on program quality is likely to be larger the larger the proportion of a station's potential audience repsented by the subscribers of the system that drops it.[58, 59] Dr. Rohlfs' calculation does not take this into account. That is he treats a station whose programming quality may be only minimally affected the same as one that experiences a larger decline in program quality.

Moreover, the harm to a household resulting from a decline in program quality is larger the larger the amount of its viewing accounted for by that station. However, Dr. Rohlfs' calculation, which uses net weekly circulation rather than ratings to measure the effect, ignores this difference. Net weekly circulation, sometimes called "cume," measures the percentage of television households that

[58] The viewership effect that Dr. Rohlfs estimates is confined to subscribers to particular cable systems in a single county. Since most television markets are made up of several counties, the effect of any particular drop on the station's total viewership in the television market, and therefore on the station's ability to maintain the quality of its programming, may be negligible.

[59] However, it is not the case that a loss of viewers necessarily results in a deterioration of program quality, and certainly not in proportion to the loss in viewers. In many cases, a drop in audience simply means that a station will pay less for the same programming.

watch any particular station *for more than 5 minutes during a survey week*. Net weekly circulation is, in effect, a measure of the extent to which households *are capable of receiving* the signal of a broadcast station, not the extent they actually *watch* the station. For that reason, net weekly circulation percentages are much more equal across stations than are ratings, and many stations with no reportable ratings nevertheless have reportable net weekly circulation.

My own empirical analysis indicates that those stations that are not carried by cable systems account for only about two percent of viewing in non-cable households. Dr. Rohlfs' calculation, by focusing on net weekly circulation, thus significantly overstates the extent of harm to television households. Indeed, his measure of harm would be unaffected even if no one watched the stations that were dropped.

Finally, even if cable drops affected the quality of the dropped station's programming, it is unlikely that there would be a significant impact on the welfare of non-cable households both because many of the network affiliates dropped by cable operators appear to have been duplicate rather than primary affiliates and the others have very small viewing shares. In sum, Dr. Rohlfs' study does not demonstrate any significant harm to the availability of "Free TV" to non-cable households.

E. Dr. Dertouzos' Empirical Analysis

The Government's memorandum in support of its motion for summary judgment claims that Dr. Dertouzos' result ". . . indicates that the carriage of additional broadcast stations on a cable system has a significant negative impact on its advertising sales volume."[60] This is *not* what Dr. Dertouzos' result demonstrates.

[60] Government's Memorandum, p.56.

Dr. Dertouzos' attempts to predict the probability that a given cable system obtains more than 1% of its total revenues from the sale of advertising[61] and claims to find that this probability is lower the more broadcast stations are carried by the system. Dr. Dertouzos interprets this result as an indication that cable operators and broadcast television stations compete "in attracting advertisers wishing to reach audiences."[62]

Without endorsing his particular methodology and estimates, the qualitative result that cable television and broadcast television compete in the sale of advertising is entirely unexceptional. It would be an error, however, to interpret Dertouzos' results to mean that a cable system could increase its advertising revenues by dropping broadcast stations or, even if it could increase its advertising revenues, that it could increase its total profits by doing so. Whether it could increase its advertising revenues would depend on *which* stations the cable system dropped. Dropping a station with an exceedingly small presence in the advertising market would have no significant effect on cable advertising revenues. And, as my analysis demonstrates, it is precisely such stations that were not carried in the absence of must carry requirements.

Moreover, the finding that the carriage of more broadcast stations reduce cable advertising revenues does not tell us by how much, nor does it permit a conclusion that cable systems have a quantitatively important incentive not to carry broadcast stations. The theoretical possibility that the incentive exists does not make it an important factor, and the empirical analysis I have conducted demonstrates how unimportant this incentive is likely to be.

More importantly, Dr. Dertouzos has misinterpreted his own results, as has the Government. Specifically, he offers an example in which a cable system that carries 8 broad-

[61] Dertouzos, ¶ 24 (p.14) and Table A-1 (p.23).

[62] Dertouzos, ¶ 25 (p.15).

cast signals rather than 4 is 36 percent less likely to earn at least 1 percent of its revenues from the sale of advertising.[63] However, the number of broadcast signals carried is actually a proxy for the number of local over-the-air broadcast signals in the cable system's service area,[64] so that the comparison Dr. Dertouzos is making is between a cable system in an area with 8 stations and a *different* system in an area with 4 stations, *not* between a cable system that is carrying all 8 stations in an area and the *same* system carrying only 4 of the 8 stations in the area. My analysis shows that the stations not being carried are quite likely to have very low viewership, so that not carrying them will have a very small effect on the cable system's advertising revenues.

Dr. Dertouzos also attempts to relate a cable system's carriage of cable program services to its carriage of local broadcast signals. He finds that the number of cable program services carried is positively correlated—or, at least, is not negatively correlated—with the number of broadcast stations carried. Dr. Dertouzos interprets his finding as evidence that cable operators are not significantly harmed by must carry requirements, since he finds no evidence that carriage of *more* broadcast stations is associated with carriage of *fewer* cable program services. However, since his analysis does not control for a system's channel capacity, his result in all likelihood merely demonstrates that systems with larger capacities carry more of both broadcast stations and cable services and smaller system carry fewer of both.

F. Dr. Peterman's Calculations

The declaration of Dr. Peterman summarizes the data obtained by the FCC in its survey conducted for this proceeding. The results presumably stand for the proposition

[63] Dertouzos, ¶¶ 26-27 (pp. 15-16). A similar example, based on his second model, is given at the end of ¶ 28 (pp.17-18).

[64] Dertouzos, ¶ 25 and footnote 1 (p.15).

that the cable industry has not been harmed by the must carry requirements since the average cable system added only 1.31 stations as a result of must carry, which accounted for 2.4 percent of the average systems' capacity.[65]

To the extent that the number of stations added due to must carry is small, this result demonstrates that most stations were being carried voluntarily, a result that is also demonstrated by my own study. Nevertheless, since the stations added due to must carry requirements have little or no measurable viewership, then cable operators, cable subscribers, and cable programmers *are* harmed if cable operators are forced to use valuable channel capacity to carry stations that add little or no value to their packages of service. Because of the must carry requirements, cable subscribers are deprived of more valued services, and cable programmers have reduced opportunity for access to scarce channel space.

In addition, the sample average compiled by Dr. Peterman mask important underlying patterns. For example, he reports that the average number of open channels is 2.01 per cable system. However, 298 (or 60 percent) of the 495 systems in his sample reported *zero* excess capacity. These systems represent 73 percent of the subscribers in his sample.

Finally, I would note that Dr. Peterman's calculation of the percentage of stations that elected must carry status includes non-commercial stations.[66] As already discussed, other evidence in the record shows that a much higher proportion of commercial stations elected retransmission consent.

V. Conclusion

For the foregoing reasons, I find the analysis and evidence presented by Defendants' experts do not demon-

[65] Peterman, Attachment 2 (first table).

[66] Peterman, Attachment 2 (first table).

strate that the local broadcast television system would be in jeopardy in the absence of must carry requirements. Moreover, it is my opinion that their analysis and evidence is insufficient to permit a finding by this Court that Congress had a reasonable basis for its predictive judgment that the availability of "Free TV" to non-cable households would be reduced because of the absence of must carry requirements. Therefore, I affirm the conclusions expressed in my declaration submitted in this proceeding.

June 15, 1995

/s/ Stanley M. Besen
STANLEY M. BESEN

[Certification Omitted]

Exhibit 1

Analysis of Drops of Duplicate Network Affiliates in Dr. Rohlfs' Data

StatCo (1)	Station (2)	County (3)	Cable System (4)	Used in Regression (5)	Station with Same Network Affiliation Carried by System at Time of Drop (6)
31	KCPQ	Island	Tele-Vue Systems Inc	Yes	No
34	KNRR	Ramsey	Midcontinent Cable Systems	No	Yes
35	WACH	Sumter	Vision Cable Communications	Yes	No
36	WATL	Newton	City of Covington	Yes	No
37	WCOV	Pike	TCI TKR of Alabama Inc	Yes	No
39	WFXR	Amherst	SVHH Cable Acquisition, LP	Yes	Yes
43	WTTO	Etowah	Comcast Cablevision of Gadsden	Yes	Yes
		Etowah	Cable South Inc		
		Etowah	Cable South Inc		
44	WZTV	Montgomery	Cencom Cable Income Partner	Yes	No
53	KDUH	Scotts Bluff	TCI Cablevision of Nebraska	Yes	Yes
54	KETV	Platte	Time Warner Entertainment Co	Yes	Yes
		Platte	Vantage Cable Associates Inc		
		Platte	Douglas Cable Communication		
56	KNTV	Marin	Tele-Vue Systems Inc	Yes	Yes
		Marin	Novato Cable Co		
57	KNTV	Napa (South)	Tele-Vue Systems Inc	Yes	Yes
		Napa (South)	ML Media Partners LP		
58	KNTV	San Francisco	Television Signal Service Inc	Yes	Yes
		San Francisco	Gulf American Cable Group Inc		
		San Francisco	Gulf American Cable Group		
61	KOLO	Lassen	CDA Cable Inc	Yes	Yes
64	KVCT	Victoria	Texas Telecable Inc	Yes	No
		Victoria	Calco Construction Co Inc		
		Victoria	USA Cablesystems Inc		
		Victoria	USA Cablesystems Inc		
65	WAKC	Erie	Erie County Cablevision Inc	Yes	Yes
		Erie	Adelphia Cablevision Assoc		
67	WATM	Bedford	TCI of Pennsylvania Inc	Yes	Yes
69	WPSD	Cape Girardeau	TCI Cablevision of Missouri	No	No
		Cape Girardeau	Comsat Video Enterprises Inc		
70	WQAD	Henry	Cablevision Associates VII	Yes	Yes

Exhibit 1 (cont.)

StatCo (1)	Station (2)	County (3)	Cable System (4)	Used in Regression (5)	Station with Same Network Affiliation Carried by System at Time of Drop (6)
71	WZZM	Calhoun	Westmarc Development Joint	Yes	Yes
72	KBIM	Otero	Scott Cable Communications Inc	No	Yes
		Otero	Scott Cable Communications Inc		
74	KRQE	Grant	Century New Mexico Cable TV	Yes	Yes
		Grant	Century New Mexico Cable TV		
75	KTVL	Curry	Falcon Telecable	Yes	Yes
76	KTVN	Lassen	CDA Cable Inc	Yes	Yes
77	WCCO	Crow Wing	Bresnan Communications Co	Yes	Yes
79	WHDH	Barnstable	Westmarc Development Joint	Yes	No
80	WISH	Cass	Sammons Communications Inc	Yes	Yes
81	KETK	Nacogdoches	Texas Community Antennas Inc	Yes	Yes
82	KOBI	Jackson	TCI Cablevision of Oregon Inc	Yes	No
83	WBZ	Cheshire	Paragon Communications	No	Yes
		Cheshire	Lamont Television Systems Inc		
84	WCNC	Richmond	Time Warner Entertainment Co	Yes	No
85	WICD	Macon	UACC Midwest Inc	No	Yes
		Macon	Triax Cablevision USA LP Inc		
86	WJAC	Mifflin	TCI of Pennsylvania Inc	Yes	Yes
87	WTHR	Cass	Sammons Communications Inc	Yes	No
89	WTWC	Decatur	TCI TKR of Georgia, Inc	Yes	Yes
		Decatur	Vista Communications LP		
90	WYFF	Stephens	Robin Media Group, Inc	Yes	Yes

Summary:

For 25 of the 36 station-county combinations (statcos) in Dr. Rohlfs' final sample, the system carried a duplicate network affiliate at the time of the drop.

For 21 of the 31 statcos used in Dr. Rohlfs' regression analysis, the system carried a duplicate network affiliate at the time of the drop.

Sources:
Columns (1) - (4) from Dr. Rohlfs' STNLIST database.
Column (5) from Dr. Rohlfs' EXHEVAR database.
Column (6) from Dr. Rohlfs' STNLIST database and *Television & Cable Factbook*, Cable and Stations Volumes, Warren Publishing, Washington, D.C., 1988-1995 editions.

Exhibit ...nt.)

Underlying Information Used in the Analysis

Network Affiliated Stations in Dr. Rohlfs' Sample									Additional Information from Factbooks	
StatCo (1)	Station (2)	County (3)	Channel (4)	Type (5)	State (6)	Community (7)	Cable System (8)	Year of Drop (9)	City of License (10)	Description (11)
31	KCPQ	Island	13	FOX/VHF	WA	Oak Harbor	Tele-Vue Systems Inc	1992	Tacoma, WA	System shown carrying KCPQ in 1992
34	KNRR	Ramsey	12	FOX/VHF	ND	Devils Lake	Midcontinent Cable Systems	1989, 1990	Pembina, ND	System shown carrying FOX affiliate KVRR (Fargo, ND) in 1989 and 1990; KNRR was a satellite of KVRR during this time
35	WACH	Sumter	57	FOX/UHF	SC	Sumter	Vision Cable Communications	1988	Columbia, SC	Picked up again in 1989
36	WATL	Newton	36	FOX/UHF	GA	Covington	City of Covington	1990	Atlanta, GA	System shown carrying WATL in years 1990-92
37	WCOV	Pike	20	FOX/UHF	AL	Troy	TCI TKR of Alabama Inc	1985	Montgomery, AL	Picked up again in 1987
39	WFXR	Amherst	27	FOX/UHF	VA	Amherst	EVHH Cable Acquisition, LP	1991	Roanoke, VA	System shown carrying FOX affiliate WJPR (Lynchburg, VA) in 1991; WFXR (formerly WVPT) was a satellite of WJPR during this time
43	WTTO	Etowah	21	FOX/UHF	AL	Gadsden	Comcast Cablevision of Gadsden	1991	Birmingham, AL	System shown carrying WTTO in years 1991-92
		Etowah				Hokes Bluff	Cable South Inc	1991		System shown carrying FOX affiliate WHAL (Gadsden, AL) in 1991
		Etowah				Southside	Cable South Inc	1991		System shown carrying FOX affiliate WHAL (Gadsden, AL) in 1991
44	WZTV	Montgomery	17	FOX/UHF	TN	Clarksville	Concom Cable Income Partner	1987	Nashville, TN	System shown carrying WZTV in years 1987-89
53	KDUH	Scotts Bluff	4	ABC/VHF	NE	Scotts Bluff Co.	TCI Cablevision of Nebraska	1992	Scottsbluff, NE	System shown carrying ABC affiliate KOTA (Rapid City, SD) in 1992; KDUH was an affiliate of KOTA during this time
54	KETV	Platte	7	ABC/VHF	NE	Columbus	Time Warner Entertainment Co		Omaha, NE	System shown carrying KETV and ABC affiliate KCAU (Albion, NE) in years 1987-92
		Platte				Humphrey	Vantage Cable Associates Inc	1989		System shown carrying ABC affiliate KCAU (Sioux City, IA) in 1989
		Platte				Duncan	Douglas Cable Communication	1990		System shown carrying KETV and ABC affiliate KCAU (Albion, NE) in years 1990-92
56	KNTV	Marin	11	ABC/VHF	CA	Corte Madera	Tele-Vue Systems Inc	1987	San Jose, CA	System shown carrying ABC affiliate KGO (San Francisco, CA) in 1987
		Marin				Novato	Novato Cable Co	1989		System shown carrying ABC affiliate KGO (San Francisco, CA) in 1989
57	KNTV	Napa (South)	11	ABC/VHF	CA	Napa	Tele-Vue Systems Inc	1987	San Jose, CA	System shown carrying ABC affiliate KGO (San Francisco, CA) in 1987
		Napa (South)				Yountville	ML Media Partners LP			System not found
58	KNTV	San Francisco	11	ABC/VHF	CA	San Francisco	Television Signal Service Inc	1987	San Jose, CA	System shown carrying KNTV and ABC affiliate KGO (San Francisco, CA) in years 1987-90
		San Francisco				San F-St. Franc Pl	Gulf American Cable Group Inc			System not found
		San Francisco				San F-Fox Plaza	Gulf American Cable Group			System not found
61	KOLO	Lassen	8	ABC/VHF	CA	Susanville	CDA Cable Inc	1991	Reno, NV	System shown carrying KOLO and ABC affiliate KRCR (Redding, CA) in years 1991-92
64	KVCT	Victoria	19	ABC/IND/FOX /UHF	TX	Victoria	Texas Telecable Inc		Victoria, TX	System not found
		Victoria				Bloomington	Calco Construction Co Inc			System not found
		Victoria				Placedo	USA Cablesystems Inc			System not found
		Victoria				Nursery	USA Cablesystems Inc			System not found
65	WAKC	Erie	23	ABC/UHF	OH	Sandusky	Erie County Cablevision Inc	1990	Akron, OH	System shown carrying ABC affiliate WEWS (Cleveland, OH) in 1990
		Erie				Vermilion	Adelphia Cablevision Assoc	1990		System shown carrying WAKC and ABC affiliate WEWS (Cleveland, OH) in years 1990-92
67	WATM	Bedford	23	ABC/UHF	PA	Bedford	TCI of Pennsylvania Inc	1989	Altoona, PA	System shown carrying WATM and ABC affiliate WJLA (Washington, DC) in 1989
69	WPSD	Cape Girardeau	6	NBC/VHF	MO	Cape Girardeau	TCI Cablevision of Missouri	1988	Paducah, KY	System shown carrying WPSD in years 1988-92
		Cape Girardeau				Cape Gir-Hi	Comsat Video Enterprises Inc			System not found
70	WQAD	Henry	8	ABC/VHF	IA	Mt. Pleasant	Cablevision Associates VII	1992	Moline, IL	System shown carrying ABC affiliates KCRG (Cedar Rapids, IA) and KTVO (Kirksville, MO-Ottumwa, IA) in 1992

Exhibi .)

StatCo (1)	Station (2)	County (3)	Channel (4)	Type (5)	State (6)	Community (7)	Cable System (8)	Year of Drop (9)	City of License (10)	Description (11)
71	WIZM	Calhoun	13	ABC/VHF	MI	Battle Creek	Westmarc Development Joint	1986	Grand Rapids, MI	System shown carrying WIZM and ABC affiliate WUHQ (Battle Creek, MI) in 1987-89
72	KBIM	Otero	10	CBS/VHF	NM	Alamogordo	Scott Cable Communications Inc	1988	Roswell, NM	System shown carrying CBS affiliates KDBC (El Paso, TX) and KOOH (Albuquerque, NM) in 1988
		Otero				Tularosa	Scott Cable Communications Inc			System not found
74	KRQE	Grant	13	CBS/VHF	NM	Silver City	Century New Mexico Cable TV	1989	Albuquerque, NM	System shown carrying KRQE (then called KOOH) and CBS affiliate KDBC (El Paso, TX) in 1989
		Grant				Baynard	Century New Mexico Cable TV	1989		System shown carrying KRQE (then called KOOH) and CBS affiliate KDBC (El Paso, TX) in 1989
75	KTVL	Curry	10	CBS/VHF	OR	Brookings	Falcon Telecable	1990	Medford, OR	System shown carrying CBS affiliates KVIQ (Eureka, CA) and KPIX (San Francisco, CA) in 1990
76	KTVN	Lassen	2	CBS/VHF	CA	Susanville	CDA Cable Inc	1991	Reno, NV	System shown carrying KTVN and CBS affiliate KHSL (Chico, CA) in 1991
77	WCCO	Crow Wing	4	CBS/VHF	MN	Brainerd	Bresnan Communications Co	1990	Minneapolis-St. Paul, MN	System shown carrying CBS affiliate KCCW (Walker, MN) in 1990. KCCW was a satellite of WCCO during this time
79	WHDH	Barnstable	7	CBS/VHF	MA	Barnstable	Westmarc Development Joint	1991	Boston, MA	Picked up again in 1992
80	WISH	Cass	8	CBS/VHF	IN	Logansport	Sammons Communications Inc	1986	Indianapolis, IN	System shown carrying CBS affiliate WLFI (Lafayette, IN) in 1987
81	KETK	Nacogdoches	56	NBC/UHF	TX	Nacogdoches	Texas Community Antennas Inc	1992	Jacksonville, TX	System shown carrying NBC affiliates KPRC (Houston, TX) and KTAL (Shreveport, LA-Texarkana, TX) in 1992
82	KOBI	Jackson	5	NBC/VHF	OR	Medford	TCI Cablevision of Oregon Inc	1985	Medford, OR	Picked up again in 1986
83	WBZ	Cheshire	4	NBC/VHF	NH	Keene	Paragon Communications	1989	Boston, MA	System shown carrying WBZ and NBC affiliate WHNE (Hartford, VT) in years 1989-90
		Cheshire				Rindge Frank Piere	Lamont Television Systems Inc			System not found
84	WCNC	Richmond	36	NBC/UHF	NC	Rockingham	Time Warner Entertainment Co	1985	Charlotte, NC	Picked up again in 1987
85	WICD	Macon	15	NBC/UHF	IL	Decatur	UACC Midwest Inc	1987	Champaign, IL	System shown carrying NBC affiliate WICS (Springfield, IL) in 1987
		Macon				Argenta	Triax Cablevision USA LP Inc	1992		System shown carrying NBC affiliate WICS (Springfield, IL) in 1992
86	WJAC	Mifflin	6	NBC/VHF	PA	Lewistown	TCI of Pennsylvania Inc	1988	Johnstown, PA	System shown carrying WJAC and NBC affiliate WGAL (Lancaster, PA) in 1988
87	WTHR	Cass	13	NBC/VHF	IN	Logansport	Sammons Communications Inc	1985	Indianapolis, IN	Picked up again in 1986
89	WTWC	Decatur	40	NBC/UHF	GA	Bainbridge	TCI TKR of Georgia, Inc	1991	Tallahassee, FL	System shown carrying NBC affiliate WALB (Albany, GA) in 1991
		Decatur				Attapulgus	Vista Communications LP	1990		System shown carrying WTWC in years 1990-92 and NBC affiliate WALB (Albany, GA) in years 1991-92
90	WYFF	Stephens	4	NBC/VHF	GA	Toccoa	Robin Media Group, Inc	1991	Greenville, SC	System shown carrying NBC affiliate WXIA (Atlanta, GA) in 1991

Sources:
Columns (1)-(4), (6)-(8) from Dr. Rahlfs' STNLIST database.
Columns (5), (10), (11) from Dr. Rahlfs' STNLIST database and Television & Cable Factbook, Cable and Stations Volumes, Warren Publishing, Washington, D.C., 1984-1993 editions
Column (9) from Dr. Rahlfs' DROPDATA database.

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REBUTTAL DECLARATIONS AND EXHIBITS

VOLUME VIII

* * * *

Dated: June 16, 1995

IN THE UNITED DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SECOND DECLARATION OF TOM MEEK

Pursuant to 28 U.S.C. § 1746, I, Tom Meek, submit this supplmental declaration to address certain matters raised by plaintiffs' experts Besen, McLaughlin and Klein, and other points raised in plaintiffs' recent submissions.

Besen's Analysis of Broadcast Viewership

1. Dr. Besen's methodology is sufficiently flawed that many of the numerical as well as more theoretical, conclusions that he reports are unreliable. These flaws, such as his misappliaction of ratings data and standards, and his definition of a local station, are discussed below.

2. Further, Besen looked only at one aspect of carriage. He did not analyze the extent to which cable systems subjected broadcast stations to other competitive harms, such as part-time carriage, channel shifting, carriage on a tier not available to all subscribers or other competitive injuries.

3. Besen also looked at carriage at a single point in time instead of attempting to analyze carriage decisions over the entire post-Quincy period. His numerical analyses are not indicative of trends and provide little basis for predicting future developments if the must-carry provisions are struck down.

4. Even within its own scope, there are major methodological flaws in Besen's analysis. *First,* Besen states a lower viewership for stations denied carirage than would be stated if measured by audience meters, because it is likely that all of the ratings used in his sample are measured by the diary method (even in metered markets, which are only 15 percent of total markets). Even in metered markets, Nielsen generally reports non-cable ratings only from the diary sample. It is widely recognized in the

broadcast industry that reported ratings for independent stations will vary dramatically depending on whether the rating is based on diaries or meters. Indeed, I am aware of Nielsen estimates that when ratings for a second independent station in a market are measured by meters rather than diaries, many stations' ratings more than double, even if the same station in the same market during the same survey period is measured. Nielsen itself acknowledges this differential when marketing its metered service to independent stations.

Ratings of cable programming services, significantly, are based only on metered results, using ratings from the national metered sample, adjusted to the service's net coverage area. If local broadcast station ratings were also based exclusively on a net coverage area meter-based universe, average ratings would be significantly higher for most broadcast stations.

5. Because of the protective order entered in this case, I have been instructed not to opine on the merits of these competing methodologies. For present purposes, the point is that Besen has chosen to rely on ratings that are exclusively reported on the basis of diaries, rather than relying on the much higher ratings achieved when meters are used. Although this may be convenient for his purpose, it is also extremely problematic because the identical station will receive a very different rating depending on which approach is used, and his methodology is heavily weighted to ratings data that produces dramatically lower rating results for station types he contends are subject to noncarriage.

6. Second, Besen's results are also biased against smaller independent stations because they rely on ADI-wide ratings *regardless* of whether the broadcast station being studied is attempting to serve the entire ADI, and regardless of whether it would be entitled to cable carriage for the entire ADI. Under the must carry provisions, a station that is serving only part of an ADI and does not provide an adequate signal to cable systems throughout the ADI, can only gain carriage for those systems to

which it provides an adequate signal. That station will necessarily have higher viewership in the area it is serving than in the entire ADI. Yet Besen calculates its viewership based on the ADI as a whole, rather than the area it is serving (and in which it will be eligible for cable carriage). For this reason, a station identified by Besen as having low viewership, may have significantly higher viewership in the area it is servicing.[1]

7. *Third*, Besen has relied on ratings data that excludes weekend viewership (i.e., his analysis is based on ratings data for Monday-Friday). This exclusion is also significant, and further biases his results against independent stations, because independent stations tend to have

[1] The FTC Bureau of Economics' analysis of the FCC's 1988 survey data contains similar biases. Although the staff that prepared that report provide an incomplete description of methodology, there are several points that are apparent. First, although the staff argues that dropped network affiliates provide duplicative programming, it ignores the fact that affiliates of the same network may provide significantly different programming (such as different news and other local programming) for television audiences, and that even a second affiliates carried by a cable system is likely to have much higher ratings that cable networks. Second, with respect to independent stations the staff found that sixty percent of the time the dropped station had reported ratings, and forty percent of the time it did not. This analysis (which is based on viewership in an entire television market and relies on Arbitron diaries), can be expected to significantly understate independent station viewership for the reasons explained above. Third, the staff's suggestion that many of these stations were ranked near the bottom of their market does not address the relevant question, because even broadcast stations at that level often have higher viewership than many or most programming services carried by cable. Fourth, the report fails to acknowledge that the FCC data does not reflect the stations that were carried by cable systems for a portion of the time in 1987 but later dropped because of the *Century* decision.

In short, while the Bureau's analysis was primarily based on carriage practices in 1988 and earlier, even for that period it provides little support for the staff's speculation that non-carriage of independent stations may have been motivated by the desire to carry "more popular cable services." Indeed, the staff's analysis says nothing about the relative popularity of these broadcast stations and the cable networks that received carriage.

significantly higher ratings on weekends. The difference is sufficiently marked that some independents, which are ranked well below network-affiliated stations on weekdays, are the number one rated stations on weekends. Besen provides no explanation for his decision to exclude this viewership for time periods in which the noncarried stations may achieve higher ratings. Indeed, it appears that Besen may have little expertise concerning the various issues relating to audience measurement. DAE VOL. IV.A, Besen Dep. at 271 (testifying that he is "not an expert on the acquisition of ratings data" and does not know whether "metered reporting results in significantly higher viewership for the small stations than diary reporting"). For example, other FCC cable or copyright rules require seven-day viewing estimates; weekday-only data cannot be used.

8. *Fourth*, Besen's use of audience viewing data from the November sweeps period alone further depresses averages because they are competing then against the new fall first-run schedules offered by network affiliates. Independents generally show higher ratings during other sweep months, particularly May and July.

9. *Fifth*, much of Besen's report is based on a definition of "local" stations that is different, and more restricted, than the definition used in the must-carry provisions at issue in this case, because Besen does not regard a broadcast station as local to a cable system unless the system is both within the station's ADI *and* within 50 miles of its transmitter site, a different reference point than used for any cable or copyright rules and results in an inappropriate set of cable systems for analysis. Further, the definition is inconsistent with the definitions used by any previous must-carry rules, including those in effect before the *Century* decision, and with the definitions used in copyright and other industry regulations.

10. *Sixth*, Besen's analysis looks at ratings of broadcast stations, a significant number of which had been subjected to adverse actions by cable systems, soon after

must-carry rules became effective. It would be consistent with Besen's analysis to conclude that broadcast stations unable to obtain cable carriage assurances before commencing operation, and then denied carriage after they begin operation, have in many instances had their programming options limited and have had their viewership constrained, precisely because they have been denied cable carriage.

11. There is a clear relationship between the ability of a broadcast station to achieve cable carriage and its ability to obtain quality programming. For example, stations attempting to develop into competitive traditional independents frequently rely on "barter" programming—in which a program syndicator retains a portion of the advertising time for sale—as a principal source of programming. Program syndicators, in turn, rely upon potential distribution as a key factor in determining whether they will even offer barter programming to a station. They are fully aware that a station without competitive cable carriage will have little or no chance of getting sufficient ratings for the program to support the barter portion of the program's advertising, and that the rogram will be more likely to fail as a result of being carired on stations which have been excluded from cable homes. Thus, cable companies who refuse to carry broadcast stations can create and perpetuate a cycle of permanent weakness for new stations and stations attempting to improve their competitive position the market who are denied access to better programming because of poor cable carriage. Similar observations could be made based on the revenue impact of being denied cable carriage. The fundamental point is that denial of cable carriage can significantly affect a station's ability to achieve both programming and viewership. (Adverse impacts on the revenue and programming of a station will affect ratings in both noncable and cable homes.)

12. It is simply not possible to discern from Besen's results whether he has measured the explanation for noncarriage, or the impact of noncarriage, or some combination of both.

13. This methodological shortcoming can be illustrated by reference to the broadcast stations that came on the air from 1985 through 1992. As explained in my prior declaration, these stations experienced severe carriage difficulties (collectively being denied carriage by cable systems with more than fifty percent of all subscribers through 1992). With some variation, these difficulties were encountered by every type of broadcast station, including network affiliates. This experience is important, because this is the class of stations that was not *already carried* by cable systems as of July 1985 by virtue of the pre-*Quincy* must carry requirement. Thus, these stations are indicative of the very serious difficulties that stations encountered in securing carriage during 1985-1992 as the number of cable programming alternatives expanded, vertical integration in the cable industry mushroomed, and the cable industry became increasingly interested in local advertising opportunities. Treatment of these stations are further indicative of how cable systems will react in the future without must-carry. In this context, it should be noted that, under the pre-*Century* rules cited by Besen and others, new stations were eligible for must-carry regardless of their viewing share for the first year of oepration.

14. As discussed above, in many cases a station unable to gain assurance of cable carriage is seriously disadvantaged in obtaining revenue and programming needed to operate successfully. The fact that post-*Quincy* stations as a group have experienced serious carirage problems (i.e., the *average* of these broadcast stations achieves less than fifty percent carriage), is a strong indication that stations coming on the air face major obstacles to gaining cable carriage regardless of the nature of the station or its programming. While some stations may overcome these obstacles, it is evident that by 1992 many of these stations had encountered severe difficulties in gaining carriage.

15. Besen himself acknowledges the importance of cable carriage to broadcast stations, explaining his belief

that the potential increase in channel capacity due to network upgrades and digital compression "will help maintain the availability of broadcast stations to non-cable households over the longer term." Besen 5/24 Decl. at 68.

16. Besen also acknowledges "the possibility that stations with low viewership had low viewership precisely because they were not carried." (Besen Decl. at 38). He then reports that "[i]n order to deal with this possibility, I carried out my analysis using each station's November *1994* audience ratings. Most stations qualifying for must carry would presumably have been carried by then, and their 1994 ratings would better reflect their 'true' viewership." (*Id.*)

Although Besen has thus recognized this problem with his analysis, his effort to solve it is completely insufficient. The commercial stations denied carriage did not even gain access to cable pursuant to the must carry provisions until June of 1993. Most stations did not gain access until the fall of 1993, and many others did not gain access even then because of difficulties encountered with local cable systems (which, in some cases, necessitated complaints to the FCC to finally obtain carriage). Further, there is *no basis* for Besen to assume that a broadcast station that has accumulated economic injuries for years because of noncarriage will fully recover in a year even if it has gained access to cable, will have modified its programming in that time, and will have established increased viewer identification and/or loyalty. Although my prior analysis shows that ratings for the stations most likely to be affected by must-carry do substantially improve within this time period, there is no reason to believe that stations injured by noncarriage will have achieved the ratings level they would have achieved in the absence of these practices.

Besen makes another error in using unrounded share figures in determining which stations met the 2 percent threshold generally required under pre-*Century* rules. The

practice under those and other rules was to use rounded shares. Stations with a 1.5 or higher share met the threshold for must-carry, because of standard rounding practices. By using unrounded figures, Besen dismisses these stations as beneath the threshold. If these stations had been included, Besen's 98 percent carriage claim would not stand.

17. In short, Besen is calculating viewership for broadcast stations denied carriage in a manner that ignores the actual area in which the station is providing a useable signal (and will be entitled to carriage), fails to account for the impact that the carriage denial itself has had on programming and viewership, excludes the days and months when independent viewership is likely to be largest, and relies on data that nearly always provides much lower audience measurements for independent stations than metered markets. Because of the cumulative impact of these and other biases, and the fact that every one of these biases generally reduces the estimated viewership for the stations being denied carriage, Besen's analysis provides no basis for reaching meaningful conclusions about the audience shares of broadcast stations denied cable carriage.

18. Besen's analytical framework with respect to the value of programming is also inconsistent. He acknowledges, with respect to cable program services, that program services may be more valued by subscribers than is indicated by their ratings because of the intensity of the preferences of the subscribers who do watch them, such as home shopping services. Besen Dep. 237-42. Nonetheless, Besen does not attempt to determine which broadcast stations with lower ratings air specialized programming that reflects the same type of loyalty from a small but intensely interested audience. Indeed, his analysis is based on the assumption that broadcast stations with lower ratings have little value and are unworthy of survival. This view is not only internally inconsistent, it also ignores the value to the community provided by the local pro-

gramming aired by foreign language, home shopping, and other specialized broadcast stations.

Broadcast and Cable Network Viewership

19. Besen has not undertaken a nanalysis to compare the broadcast stations added pursuant to the must carry provisions with cable programming that had been carried instead of them. Plaintiffs' other expert, Ms. McLaughlin, reports, however, that "Meek shows that the average cable rating in 1994 was 0.3 percent for foreign-language stations in major DMAs, 0.1 percent for religious stations, and 0.0 percent for home-shopping stations." (McLaughlin Aff. ¶ 24). This is, however, not a fair presentation of the available information.

20. McLaughlin's analysis focuses on a small subset of the stations actually added pursuant to must carry. Plaintiffs' other expert, Dr. Shapiro, has provided estimates regarding the types of stations added by the cable industry pursuant to the must-carry provisions. Approximately ⅓ of these stations are independents (excluding home shopping and religious programming), approximately ⅓ are network affiliates, approximately 1/5 are educational stations, and the remaining 15% are religious and home shopping stations. Shapiro Report, Appendix 4 at 2, DAE VOL. II.A.

21. Most of these stations will have ratings equivalent or higher than a substantial amount of the cable programming already carried by cable systems. Indeed, this will be almost universally true for the network affiliates. Almost any network affiliate located within an ADI (as required to benefit from must carry protection) will have ratings significantly higher than virtually all of the cable programming networks carried by cable systems in that ADI (in most cases many times higher).

22. Significantly, Besen did not compare the ratings for stations that were dropped or denied carriage, were carried part-time, or were shifted to a different channel or tier, with the ratings for cable programming services

that were chosen for carriage or the channel position instead. Many independent stations have ratings equal to or higher than virtually all cable programming networks in their ADI.

23. Although McLaughlin emphasizes the lower ratings for religious, home shopping, and foreign language broadcast stations, similar programming is offered by cable networks as well as broadcast stations. In my prior declaration, I reported that the ratings achieved by these broadcast stations in cable homes since gaining must-carry rights are generally higher than that achieved in these homes by their equivalent cable counterparts. Thus, there is no empirical basis for Besen to suggest that this programming has been excluded because of subscriber preferences.

24. McLaughlin also acknowledged at her deposition that as few as 10 cable networks generate 90 percent or more of all cable ratings.

25. There are several ways to measure the ratings of cable networks in cable households. The method most frequently used by cable networks is derived by Nielsen from its meter sample measurements, adjusted to produce estimated ratings for those homes in which the cable programming network is actually being carried. Using meters and measuring only homes in which the programming is actually available to be watched (in contrast to the manner in which broadcasting viewership is evaluated by Besen) produces a figure more likely to be favorable to the cable programming network.

26. Using this method, Nielsen has reported the ratings in the fourth quarter of 1994 for 34 ad-supported cable networks (including superstations WTBS and WGN), many of which are widely carried by cable systems. *See* Attachment 1 to this Declaration. *None* of these networks achieved a rating above 1.2 in their cable net coverage area homes. Only three achieved a rating of 1.0 or higher. The distribution of the 34 services was as follows:

No. Svce		Rating
1		0.0
2		0.1
6		0.2
5		0.3
2		0.4
5		0.5
2		0.6
2		0.7
4		0.8
2		0.9
1		1.1
2		1.2
34	Avg.	0.5

Total

27. Even these net cable coverage area ratings tend to inflate the average performance of cable networks, because the reported services are among the most-watched cable programming networks. They exclude many additional cable networks, including many shopping, foreign language, and religious cable channels. I have previously reported ratings for a much broader range of cable programming networks in 15 metered ADI's. (Meek Declaration, Exhibit N). As that data reflects, a significant percentage of cable programming networks have ratings in cable households below the 0.1 level (i.e., their ratings are no reported). Thus, the available ratings data, provides a strong indication that the types of stations that Dr. Shapiro has identified as constituting two-thirds of the entire universe of stations added pursuant to must carry, are likely to achieve much higher ratings in cable homes than many of the cable programming networks offered in those homes.

28. Moreover, if Besen believes that carriage decisions by local cable operators are generally based on ratings data, he is largely mistaken about actual practice in the cable industry. Few cable systems subscribe to or utilize traditional local market ratings information for either advertising sales or making specific programming decisions as to whether to carry a particular broadcast

station. The specific ratings generated in non-cable households in a given ADI are even less of a concern. Based on numerous discussions and contacts with cable operators over the past ten years, it is clear that operators often have no specific information regarding ratings of local television stations in their market areas, and were receiving a tremendous amount of misinformation about the relative popularity of cable program services. (As explained above, because of different approaches to measurement, ratings data can be manipulated to maximize cable network performance and reduce the apparent perdreds of discussions with operators over past decade, I cannot recall an operator ever requesting non-cable ratings information for a broadcast station for any purpose other than copyright issues, even though I made a point of having such information available for them on a regular basis.

* * * *

Competition for Local Advertising

30. In analyzing local advertising markets, Mensen suggests that if cable operators were influenced by competition in this market in making carriage decisions, one would expect them to deny carriage to their primary network affiliates. In offering this opinion, Besen fails to understand the very competitive nature of local advertising sales between local cable ssytems and the smaller local broadcast stations. The analysis by staff for the FTC's Bureau of Economics and its San Francisco regional office also fails to account for this.

31. Most cable systems do not use local market ratings to sell advertising on a local basis. Rather, they use reach to a particular market area, variety of program channels, and low cost for spot advertisements as compared to traditional local broadcast television advertising (some use national ratings data supplied by cable programmers). In doing so, they are competing very directly with the smaller local television stations. Those stations sell advertising on much the same basis of low

comparative spot cost and additional frequency as do local cable systems, and are also generally less reliant on specific program ratings for local ad sales.

32. As a result, these smaller broadcast stations compete directly with cable operators for potential advertisers who have smaller budgets and as a result are unable to afford to advertise on larger local broadcast stations such as network affiliates. These smaller broadcast stations are also more dependent on the dollars gained in the local spot market, as opposed to the national spot market and network compensation, than the network affiliates. Thus, if they are denied cable carriage—and their ability to compete with cable for these revenues is constrained—they will be much more dramatically affected.

33. One way to illustrate this is to consider, by analogy, automobile sales. A Ford/Lincoln Mercury dealer (in this analogy, representing the broadcast industry) may represent a range of choices—varying from low-priced cars like the Ford Aspire and Escort (by analogy, representing independent broadcast stations) to the Lincoln Town Car and Continental (network affiliates). Few prospective purchasers of the Aspire or Escort are ecen in the market for the Continental or Town Car. Their alternative is another low-priced car sold by another local dealer, such as the Honda Civic or Hyandai Accent (by analogy, representing the lower priced advertising alternative provided by a cable operator). In this example, even if a majority of the revenues in the market go for purchases of more expensive vehicles, sellers of the Civic, Accent and equivalently priced cars are competing directly with sellers of the Aspire or Escort, and this competition can be extremely aggressive for a small portion of the total market revenue. Similarly, local cable advertising has become extremely competitive with advertising by local independent stations.

34. Historically, cable systems have therefore had greater incentives to not carry or otherwise act adversely

to new and/or smaller stations, not only because the impact on subscribership will be much more limited, but also because cable is often competing with these broadcasters for the same advertising pool, and because the ability of these stations to compete for that pool can be significantly affected by denying them carriage, or subjecting them to other adverse actions such as part-time carriage, channel shifting, or carriage on a tier not available to all subscribers.

35. It is also significant that cable's ability to compete with larger broadcasters—and affect the ability of those stations to compete for advertising—is significantly increasing with time. I have previously discussed the significant trend toward clustering cable systems. This trend, and the related trend toward use of interconnects, will better position cable to compete with larger broadcasters for local advertising dollars. Indeed, the staff analysis that Besen cites itself observes that "[t]he anticompetitive motive for carriage denial is most plausible when the cable system's franchise area is large relative to the total area served by the affected broadcast station." (FTC Bureau of Economics comments at 20) (attached to Time Warner Summary Judgment Appendix). This is, of course, precisely what is happening as large cable operators are aggressively pursuing strategies to maximize their reach in a given television market. As they do so, they are increasingly able to sell their own reach to potential advertisers, and are also in a position to limit the reach of broadcaster competitors by denying them access to the growing number of cable homes in the market area. The CDC data clearly indicates that the largest systems have added comparatively more channels under must-carry.

* * * *

65. Klein is also mistaken in his criticism of my studies for including low power stations and SMATV's. Virtually no low power stations were included in any of the data I presented. Those included served at most a

few thousand subscribers, scarcely sufficient to affect the findings. Similarly, the total number of SMATV's estimated by Kagan now stands at only 900,000 subscribers, many of which were excluded from my data. In view of the 64,000,000 cable subscribers, the existence of SMATV's in the sample had at most a very limited impact on the data presented. Further, my exclusion of any drops lasting less than 12 months likely more than compensated for any SMATV data remaining. Nonetheless, I acknowledged, in my report, the existence of the SMATV data in my sample, estimated how many such systems remain, and their impact on the universe of systems an dsubscribers.

* * * *

76. Attachment 4 contains analyses of systems in the Shapiro sample that claimed in the fall of 1994 that they were channel-locked. Information concerning additions of cable programming from March of 1993 until the fall of 1994 was obtained from the Nielsen reports discussed above; information on changes in the programming since Dr. Shapiro's survey was derived by a comparison of the survey data and the updated channel line-ups obtained from Nielsen in April of 1995. An examination of the changes on these systems prior to the Shapiro survey reveals that virtually all of these systems added numerous cable programmers after March of 1993 and indicates that, if indeed, these systems are channel-locked, it is because they have filled their current capacity with cable programming. An examination of the updated channel line-ups for those systems that claimed to be channel-locked reveals, significantly, that 37 percent of the systems have added programming since the Shapiro survey, thus demonstrating that their asserted channel constraints were illusory, or temporary.

* * * *

June 15, 1995

/s/ Tom Meek
TOM MEEK

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REBUTTAL DECLARATIONS AND EXHIBITS

VOLUME VIII

* * * *

Dated: June 16, 1995

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

REBUTTAL DECLARATION OF JEFFREY H. ROHLFS

I, Jeffrey H. Rohlfs, for my rebuttal declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:
1. On May 15, 1995, I submitted an expert declaration in this proceeding. My professional background and qualifications are stated therein.

2. I have reviewed the declaration of Stanley M. Besen and the affidavit of Linda M. McLaughlin. I have found that both Dr. Besen and Ms. McLaughlin's studies suffer from serious methodological and analytical flaws. These defects are discussed in greater detail by other of defendants' experts. *See* Rebuttal Decl. Roger Noll; Rebuttal Decl. David Schutz; Rebuttal Decl. Tom Meek; Rebuttal Decl. James Dertouzos.

3. Notwithstanding these shortcomings, I have performed an independent study of certain of Dr. Besen and Ms. McLaughlin's findings. Even using their own highly flawed data, I have found that:

a. When the statutory definition of "local" and an appropriate averaging technique are utilized, even Dr. Besen's data reveal that 47% of local non-network commercial stations were not carried and 36% of local non-commercial stations were not carried; and

b. Contrary to Ms. McLaughlin's testimony, even using her own sample, broadcast stations that were added to cable systems as a result of must-carry enjoyed significant growth in their viewership.

I also note that Dr. Besen's utilization of a viewership threshold is entirely inappropriate.

Dr. Besen's Carriage Analysis

4. Dr. Besen's report is flawed in critical respects. Other of defendants' experts have analyzed these shortcomings in significant detail. *Id.* These criticisms need not be repeated here. My assignment with respect to Dr. Besen's carriage analysis is to recalculate his carriage figure using the statutory definition of local and a more appropriate averaging technique.

5. It is worth noting that, even without these corrections, Dr. Besen reports that a significant number of local broadcast stations were not carried in the absence of must-carry. Thus, even using his flawed averaging technique and "preferred definition" of local, Dr. Besen estimates that 35% of all commercial independents (as he defines that term)[1] and 22% of all non-commercial stations were *not* carried in 1992.

6. Even these figures, however, significantly understate the extent of non-carriage of local broadcast stations in the absence of must-carry. The figures stated above are generated using Dr. Besen's "preferred" definition of local: that is, stations that are in the same Area of Dominant Influence as the cable system and that are within 50 miles of the system's principal headend. Besen Decl., p. 33. But this definition is arbitrary and inappropriate. *See* Noll Reb. Decl. ¶¶ 24-28 (detailing the flaws in Dr. Besen's personal definition of local). Accordingly, for my calculations, I have used the best aproximation for the definition of local adopted by Congress—not the one "preferred" by Dr. Besen.

7. When, I reviewed Dr. Besen's work, I realized that, in addition, his calculations utilize an unusual averaging

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[1] Dr. Besen excludes from his category of commercial independents what he describes as "Miscellaneous Networks." Besen Decl. at Exhibit C-4.

technique. The problem can be illustrated with a simple example: Suppose that there are two cable systems. One carries 5 of 5 local broadcasters; the other one (in a different locality) carries 5 of 10 local broadcasters. In this example, it is clear that two-thirds (10/15) of local broadcasters are carried. However, that is not the answer Dr. Besen gets. His technique is to observe that the first cable system carries 100 percent of local broadcasters, and the second carries 50 percent, and then to average those two numbers and conclude that 75 percent of broadcasters are carried. That answer is obviously incorrect.

8. Formally, Dr. Besen calculates the average as follows:

$$\frac{(5/5) + (5/10)}{2} = \frac{(1) + (1/2)}{2} = (3/4) = (75\%)$$

In contrast, the correct way to calculate the average is:

$$\frac{(5+5)}{(5+10)} = (10/15) = (2/3) = (67\%)$$

9. Either of these methods can be weighted by number the proportionately larger impact of carriage by large cable systems.[2] In our example, suppose that the first cable system has one subscriber and the second cable system has four subscribers. Dr. Besen would calculate the average as:

$$\frac{(1)\,X\,(5/5) + (4)\,X\,(5/10)}{5} = (3/5) = (.60) = (60\%)$$

The correct way to calculate the average, weighted by subscribers is:

$$\frac{(1\times5) + (4\times5)}{(1\times5) + (4\times10)} = (25/45) = (.56) = (56\%)$$

As before, Dr. Besen's averaging technique does not yield the correct answer.

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[2] Weighting can also be used to reflect varying sample proportions in a stratified sample.

10. Dr. Besen states some of his results in terms of the "typical subscriber." His averaging technique can support assertions couched in those terms. In the unweighted example, as discussed above, the "typical subscriber" (i.e., the average of the two subscribers) can view 75 percent of local stations over cable. In the weighted example, the "typical subscriber" (i.e., the weighted average of subscribers over the two systems) can view 60 percent of local stations.

11. Dr. Bensen's methodology would be appropriate if the primary goal of the inquiry was to discover to what extent local broadcast stations are available to the typical cable subscriber. Given the purposes of the must-carry legislation, the more appropriate inquiry is to what extent local broadcast stations have access to cable audiences. In the unweighted example, the answer to the latter question is two-thirds. That is, 10 stations can reach a cable subscriber, while 5 cannot. In the weighted example, the typical station can reach 56 percent of cable subscribers in the two systems.[3]

12. Dr. Besen appears to understand that the key issue is the proportion of local stations carried. Indeed, his critical Exhibits C-2 and C-3 are labeled "Proportion of Local Stations Carried." Unfortunately, his averaging technique does not accurately estimate that proportion.

13. Dr. Besen uses an elaborate technique to weight cable systems by number of subscribers and adjust for varying sampling frequencies in the stratified sample. This weighing technique is entirely appropriate. How-

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[3] In particular, there are 45 possible instances whereby a broadcast station could reach a cable subscriber. In the first market, 5 stations could each hope to reach 1 subscriber. In the second market, 10 stations could each hope to reach 4 subscribers. In the first market, all 5 possible instances of carriage are realized. In the second market, only 20 of the 40 instances of carriage are realized. The typical broadcaster can reach 25/45 or 56% of cable subscribers.

ever, it does nothing to solve the problem that the wrong averaging technique is used at the start. What he ends up with is an appropriately weighted estimate of the wrong number.

14. For my calculations, I use the averaging method illustrated in the last equation. For large samples, this estimate converges with probability one to the true (weighted) proportion of local stations carried. Dr. Besen's method does not converge to the correct answer—no matter how large the sample.

15. Having corrected for thees two factors, I recomputed Dr. Besen's carriage results. I found that, on average, fully 47% of local non-network commercial stations were not carried. With respect to educational stations, I found that, on average, 36% of non-commercial stations were not carried in the absence of must-carry.

Dr. Besen's Viewership Threshold

16. I was also asked to render an opinion on Dr. Besen's viewership threshold. Much of Dr. Besen's analysis is devoted to excluding broadcast stations whose viewership does not exceed a threshold, which he defines variously as a 2 percent share of local viewing, a 1/2 share of local viewing and a rating of 0.1%. *See* Besen Decl. 43, 45, and Exhibits C-2-C3, C8-C11. Such exclusions are inappropriate, and would be unfair to local broadcasters. The "Nielsen Cable Activity Report" is Attachment A to Mr. Meek's Second Declaration. *See* Meek Rebuttal Decl, Attachment A. This report shows Nielson data for cable networks for the 4th quarter of 1994. It shows viewership of cable networks. According to those data, only 11 ad-supported cable networks had a share (in their cable net coverage area) of 2 percent or more.[4]

[4] Among others, BET, Court TV, Discovery, E!, the Family Channel, Headline News, the Learning Channel, and Sci-Fi—all of which are networks owned by plaintiffs in this case—do not meet the 2% threshold, even when using the cable net coverage area, the most favorable data for cable networks.

The cable systems serving most subscribers carry far more than 11 cable networks. Hence, absent must-carry, the competition for carriage primarily involves cable networks that do not meet the 2 percent threshold.

17. Indeed, large cable systems can fill their capacity only by carrying cable networks whose shares and ratings round to zero. (There are only 26 cable networks whose shares were 1 percent or higher). This is not to say these networks should not be carried. However, there is no basis for concluding that a broadcaster is not also a viable candidate for carriage, even if it does not meet any particular viewership threshold—let alone Dr. Besen's wholly inappropriate threshold of 2 percent.

Ms. McLaughlin's Analysis of Added Broadcast Stations

18. As with Dr. Besen, Ms. McLaughlin's analysis is flawed in key respects. Another of defendants' experts point out the shortcomings in Ms. McLaughlin's report. *See* Schutz Rebuttal Decl. My assignment with respect to Ms. McLaughlin's analysis is to evaluate her conclusion that the stations added to Time Warner systems as a result of must-carry did not enjoy statistically significant increases in ratings. In fact, her own data—which are derived from a skewed sample, *see generally* Meek Rebuttal Decl.—prove the opposite: contrary to her testimony, the broadcast stations added to Time Warner systems as a result of must-carry enjoyed statistically significant increases in viewership.

19. Ms. McLaughlin's dataset consists of annual observations (November of 1992, 1993, and 1994) for each of 70 broadcast stations added to Time Warner cable systems as a result of must-carry. She examines all-day Nielsen ratings for those stations.

20. It almost goes without saying that the experience of Time Warner is not necessarily indicative of the cable industry as a whole. Indeed, the Time Warner experience may not even be indicative of cable systems owned by

other large multiple system operators—let alone, other cable companies. Ms. McLaughlin simply does not address this point.

21. With these important flaws duly noted, I report that, notwithstanding Ms. McLaughlin's testimony, in her sample, among those broadcasters for whom a rate of growth can be calculated, the average growth rate was 11.4% per year.[5] Thus, in the two-year lifespan of Ms. McLaughlin's study, those broadcasters for whom a rate of growth can be calculated had their ratings increase by 24%.

22. What is more, contrary to Ms. McLaughlin's assertions, this growth rate is significant at the 5% level. Ms. McLaughlin's analysis focuses on whether single observations are statistically significant, taking into account Nielsen sampling error. That focus is appropriate for sone applications. However, in the present case, we are concerned with trends *in the entire dataset*. Indeed, Ms. Mc Laughlin, in her affidavit draws a number of inferences about the entire dataset.

23. The standard statistical technique for drawing such inferences is to define statistics on the entire dataset; *i.e.*, the average of the sample. One can then inqure whether the statistic (*i.e.*, the average) is statistically significant. reflects errors in each individual observation (e.g., Nielsen sampling errors), as well as variation among observations.[6] It often happens that the average of a large sample is

[5] I calculated proportional growth rate in the same way as in my original declaration. The growth rate is defined for 114 of the 140 observations for year-to-year changes in Ms. McLaughlin's database. The growth rate is undefined for 26 observations—where the rating is zero both at the beginning and end of the period.

One can also calculate the arithmetic average of the difference between one year's rating and the next. This average applies to all 140 observations. It is positive and significant at the 5 percent level.

[6] For further elaboration on this issue, see paragraph 23 of my original declaration. *See* Declaration of Jeffrey H. Rohlfs dated May 25, 1995, ¶ 23.

statistically significant, even though few individual observations are statistically significant, in themselves.

24. That is precisely the case here. In particular, although the Nielson sampling errors are sizable, they average out (within the limits defined by statistical theory) over large samples. Thus, one can draw sound inferences about the average of the entire dataset, even though Nielsen sampling error clouds inferences about individual observations.

Conclusion

25. The methodologies and analyses of plaintiffs' experts, Stanley M. Besen and Linda McLaughlin, suffer shortcomings that undermine their conclusions. Nevertheless, using Dr. Besen's data, I have shown that non-carriage of local broadcast stations in the absence of must-carry was even greater than Dr. Besen reported. Similarly, I have demonstrated that even using Ms. McLaughlin's sample, the ratings of broadcast stations increased significantly when they were added to cable systems.

June 15, 1995

/s/ Jeffrey H. Rohlfs
JEFFREY H. ROHLFS

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REBUTTAL DECLARATIONS AND EXHIBITS

VOLUME VIII

* * * *

Dated: June 16, 1995

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

REBUTTAL DECLARATION OF DAVID E. SCHUTZ

I, David E. Schutz, for my rebuttal declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I am a broadcast financial consultant and Vice President of Hoffman Schultz Media Capital, Inc. During the past 23 years all of my professional work has involved financial research in the radio and broadcast television industries. My statement of qualifications, publications and prior testimony is attached to my declaration dated May 23, 1995, previously submitted in this case.

2. I have been asked by the defendants herein to review the affidavit, dated May 25, 1994, that Ms. Linda McLaughlin has submitted in this proceeding on behalf of plaintiffs (the "McLaughlin Aff."), and to evaluate the conclusions reached by her. I have also been asked by defendants to comment on the appropriateness of Congress's choice of the Area of Dominant Influence (ADI) as a criterion for defining "local" broadcast stations entitled to must-carry protection.

Summary of Conclusions

3. Ms. McLaughlin undertook to evaluate the effects of cable carriage on 70 broadcast television stations that were added to Time Warner cable systems as a result of the must-carry law. Speficially, she investigated (i) whether "the added commercial stations [were] in particularly poor financial condition before the implementation of the 1992 must-carry law," (ii) whether "the must-carry requirement ha[d] a significant effect on the viewership

of the added commercial and noncommercial stations," and (iii) whether "the must-carry requirement actually improve[d] those stations' financial condition." McLaughlin Aff., ¶ 3.

4. Based on my review of Ms. McLaughlin's affidavit, the financial and ratings data on which she relies, and my 23 years' experience in the specific field of broadcast stations finance working with over 600 stations, I find that Ms. McLaughlin employs fundamentally flawed research methodologies. These lead her to erroneous, indeed, counter-intuitive conclusions regarding the impact of changes of cable carriage to broadcast television stations. Specifically, I conclude that:

(a) Because she inappropriately uses cash flow margins to measure profitability, Ms. McLaughlin paints a mistakenly brought picture of the added stations' pre-must carry financial condition. In fact, of the 24 stations whose financial condition she examines, 13 of them were home shopping, religious or foreign language stations, many of whom are unlikely to have significant financial reserves necessary to withstand unexpected declines in revenue. Nine of the remaining eleven stations (including all the general independents), were actually either unprofitable or were highly economically marginal, and, contrary to Ms. McLaughlin's conclusion, much in need of must-carry protection.

(b) Ms. McLaughlin's analysis of the added stations' ratings gains is fundamentally flawed because she looks only at the total market-wide ratings changes for her subject station. She fails to consider the number of subscribers added and this number's relationship to the TV market's total size. With national cable penetration averaging 62% it is safe to assume that the number of subscribers added on Time Warner's systems is only a portion of the market's total TV households. As such, the impact of additional carriage will always be diluted or completely hidden by examining market-wide (cable and non-cable) ratings as Ms. McLaughlin has done. This means that the changes in viewing patterns may be much greater than the market-wide ratings changes relied upon by Ms. McLaughlin.

(c) Ms. McLaughlin is wrong in dismissing as "extremely small" and "statistically insignificant" the ratings gains that were experienced by the added stations in her sample. Her conclusions are contrary to broadcast industry practice wherein stations are concerned with relative changes in their ratings, and the statistical accuracy of individual ratings numbers is not seriously questioned. Her analyses attempt to mask the policies that must-carry was intended to promote.

(d) Ms. McLaughlin examines the financial condition of *three* of the added stations, finds that their financial condition improved after must-carry was implemented, cites no other possible reasons for the change, but concludes that the improvement cannot be clearly linked to must-carry. Examining eight of the stations in Ms. McLaughlin's sample for which I have the necessary cable carriage, ratings, and financial data, I find that the improved financial condition of these added stations is plainly attributable to must-carry.

5. Aside from Ms. McLaughlin's affidavit, plaintiffs challenge the decision by Congress to use a broadcast station's Area of Dominant Influence (ADI) as the primary criteria for must-carry eligibility, rather than limiting mandatory carriage rights to those stations within 50 miles of a cable system's headend.[1] Today's use of the

[1] *See, e.g.*, Time Warner Entertainment Company, L.P.'s Memorandum of Law in Support of Its Motion for Summary Judgment at 81; Memorandum of Discovery Communications, Inc. in Support of Plaintiffs' Motion for Summary Judgment at 44-48; Memoran-

ADI is more appropriate than the 50-mile rule under previous versions of must-carry, originally developed over 20 years ago. ADIs are based on the viewership patterns of consumers, and represent the marketing areas in which television station ratings and advertising revenues are determined.

Pre-Must Carry Profitability of the Added Stations

6. According to Ms. McLaughlin, she randomly selected 24 of the 52 commercial stations added to Time Warner systems as a result of the must-carry law, and analyzed their 1992 cash flow margins so as to measure their profitability before must-carry went into effect. McLaughlin Aff., ¶¶ 5-6 & Exh. 3 (Table).

7. Ms. McLaughlin is wrong to assert that cash flow, at least as she generally defines it, "is an appropriate measure for comparing commercial station profitability." McLaughlin Aff., ¶ 6 & n. 4. Indeed, by doing so she exhibits a lack of familiarity with fundamental principles of broadcast economics. When dealing with issues of economic vitality, as are at stake here, her calculation of cash flow does not take account of at least two essential and inescapable financial obligations of individual broadcasters.

8. First, Ms. McLaughlin's definition of cash flow margins as an indicator of financial vigor does not allow for debt service (principal and interest). As I noted in my first declaration in this proceeding, the construction or acquisition of a broadcast television station normally burdens its owner with millions of dollars in debt. Schultz Declaration, ¶ 12. This debt must be repaid, normally on an installment basis over a 7-10 year period.

9. Second, her definition of cash flow margin does not provide for routine capital expenditures essential to the

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dum of Cable Programmer Plaintiffs Turner Broadcasting System, Inc., et al., in Support of Their Motion for Summary Judgment at 51-52.

continued functioning of a broadcast station, such as the replacement of technical equipment.

10. Both debt service and capital maintenance are essential expenditures which must be met if a broadcast station is to remain a solvent and viable business enterprise on a long-term basis. It is only after the payment of these essential items that funds may be available for the acquisition or production of programming. Ms. McLaughlin's failure to consider debt service and capital expenditures paints an erroneously inflated picture regarding the profitability of the added stations which would not be accepted in the financial community as truly indicative of their economic health.

11. Ms. McLaughlin's analysis also diverges from accepted principles of broadcast station finance because she evaluates the added stations' financial condition exclusively in terms of cash flow *margin*, that is, cash flow (net television revenues less certain operating expenses) as a percentage of net revenue. McLaughlin Aff., ¶¶ 618 & n. 4. As a result, Ms. McLaughlin's report provides no indication of the precise amount of each station's profits.

12. This is a serious oversight for purposes of her analysis, because more than half of the stations (13 of 24) in Ms. McLaughlin's sample are either home shopping, religious, or foreign-language stations. McLaughlin Aff., Exh. 4 (Table). Generally speaking, stations of these sorts tend to have low absolute revenues and even lower operating expenses, because, among other things, they tend not purchase or produce their own programming, or sell spot advertising time. As a result, they can have low absolute cash flow levels, but exhibits high cash flow (percentage) margins. In reality their absolute cash flows can be low compared to some of the network affiliates in Ms. McLaughlin's sample.

13. Because their absolute cash flows are often small, and because many of these stations are unlikely to have significant financial reserves, unexpected declines in reve-

nue can rapidly plunge them into insolvency. A religious, foreign-language or home shopping station might have a significant operating margin, like the 12% cited by Ms. McLaughlin for WSFJ (McLaughlin Aff., Exh. 4, Table) but have only $131,755 in cash flow.[2] The need to replace UHF transmitter tubes, or similar expected capital expenses, could eradicate this small cash flow instantly.

14. Taking these factors into account, the actual profitability of the stations analyzed by Ms. McLaughlin is, in fact, far worse than she represents. In 1992, according to Ms. McLaughlin's calculations, 9 of the remaining 11 added commercial stations (including *all* the general independents) either had a negative cash flow margin, or cash flow margins of between two and twelve (2-12) percent. McLaughlin Aff., Exh. 4 (Table).

15. According to information contained in the NAB's *Television Financial Report*, in 1992 the average independent television station (revenues between $2-$5 million) had interest expenses of $412,936 (excluding repayments). With the same stations having average (net) revenues of $3,327,477 this means that required interest payments alone consumed 12% of revenue. Since six of Ms. McLaughlin's stations have cash flow margins of 12% or less, the number of stations in her sample that are *unprofitable* increases further from six to twelve. While the NAB did not publish the information, it is a certainty that principal payments on loans as well as required capital expenditures for routine replacement of technical equipment were additional required expenditures which reduced so-called cash flow, at all of her sample stations.[3]

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[2] This information is derived from 1992 financial information for WSFJ produced in response to a subpoena issued by Time Warner.

[3] In general, principal repayments on loans to broadcasters are equal to, or greater than, interest payments alone. In addition, in 1993, the first year NAB published the data, the average independent station of this size had $63,516 in annual capital expenditures, an amount equal to an additional 2% of average net revenue.

16. This means that in 1992, 9 of the 11 non-niche stations analyzed by Ms. McLaughlin, including all of the general independent stations, were probably very marginal business enterprises with little or no real profitability.

Must-Carry's Benefit to the Added Stations' Audience Ratings

17. Ms. McLaughlin next examines the change in audience levels of the 70 commercial and non-commercial stations that were added to Time Warner cable systems as a result of must-carry regulation. McLaughlin Aff., ¶¶ 9-14. She is wrong in concluding that "the vast majority of the added stations had no statistically significant increase in audience ratings due to the must-carry requirements." *Id.*, ¶ 14. This results from her inappropriate consideration only of the absolute change in ratings values for the 70 stations which she examined. McLaughlin Exh. 5 (Table). In the broadcasting industry, it is the relative change in audience rating that is important to a station.

18. The fact is that when it comes to ratings changes, the significant question for individual broadcast stations is not the absolute change, as Ms. McLaughlin states, but rather the relative change in those ratings levels. For example, consider the change in audience ratings for general independent WWAT, Columbus, Ohio. McLaughlin Aff., Exh. 5 (Table); *see also* Table A, attached to this Declaration. Between November, 1992 (pre-must carry) to November, 1994 (post-must carry), WWAT's rating grew from a 0.1 to 0.3. An increase of this magnitude may seem small to Ms. McLaughlin (*see* McLaughlin Aff., ¶¶ 13-14), but the relative change represents a tripling of rating for the subject station, and would be recognized in broadcast and advertising circles as a significant increase.

19. Even for those smaller advertisers and program time purchasers that are not solely dependent upon rat-

ings, relative changes in ratings levels are a factor which can influence their business relationships with individual broadcast TV stations. A rising ratings trend is considered indicative of a growing station with an expanding audience. This is something which advertisers and program time purchasers deem to be good and which can allow the individual station to raise its rates and its overall revenues.

20. When viewed on the basis of relative change in audience rating, most of the subject stations did, in fact, experience notable increases in rating after obtaining cable carriage on Time Warner's systems. Table A shows the relative change in audience ratings for 69 full power commercial and noncommercial stations listed in Ms. McLaughlin's report.[4]

21. The eight home-shopping stations show no ratings increase, but this is to be expected. The revenue of home-shopping stations is dependent upon the volume of products that their viewers purchase, not ratings. Even profitable home-shopping stations normally do not have reportable ratings.[5] Many stations programming home-shopping are doing so as an interim operating strategy until they are able to gain sufficient profitability to offer more traditional mass-appeal programming. Schutz Decl. ¶ 31.

22. Among the remaining 43 commercial stations, more than half (23) had positive changes in ratings following the implementation of must-carry. Only five experienced a rating decline. The remaining 15 had no

[4] Ms. McLaughlin includes one low power station in her analysis, McLaughlin Exh. 5 (Table), which I have excluded. By definition, a low power station lacks the over-the-air signal range to be a market-wide competitor.

[5] This is not to say that home-shopping stations do not benefit from cable carriage. Generally speaking, the greater the size of theh audience they can reach, the greater is the amount of sales they can generate, and royalties they can earn.

change in ratings. Among those stations for which a growth rate can be calculated, ratings increased by 24% between November, 1992 and November, 1994. *See* Rohlfs Rebuttal Decl.

23. Among the noncommercial stations, seven experienced increases, seven remained unchanged (change of less than 0.1) and only four declined.

24. This is a significant increase on its face, and quite remarkable considering that Ms. McLaughlin's analyses are fatally flawed. First, she fails to consider that must-carry did not become effecitve until June, 1993, and many broadcast stations did not obtain carriage until late 1993. By November, 1994, many stations would have been carried in cable households for little more than a year, and still may not have "found" their audience.

25. More fundamentally, perhaps, Ms. McLaughlin fails ever to note either (i) the absolute number of households added to the subject stations' potential audience, or (ii) the relative increase in the size of the stations' potential audience, as a result of being added to Time Warner's systems.

26. In other words, her data do not reveal just how many additional cable television households each subject station gained access to, or what additional proportion of the potential audience in the local television market (ADI) they represent. Yet notwithstanding the lack of this essential information, which may vary widely from station to station, she makes sweeping and wholly counter-intuitive assertions regarding the supposed lack of correlation between changes in broadcast station cable carriage and changes in both their audience and financial performance.

27. In connection with preparing my expert report and earlier declaration in this matter, I obtained multi-year listings of the numbers of cable subscribers for 11 of the commercial stations examined by Ms. McLaughlin.

With respect to these 11 stations, this material permitted me to evaluate these essential factors which Ms. McLaughlin fails to consider in her analysis. *See* Exhibit B, hereto.

28. In most cases, the number of total cable households to which these 11 stations gained access as a result of carriage on Time Warner and other systems was a relatively small portion of the local market's total television households. Eight gained additional subscribers equivaent to 20 percent or less of their market's total television households.

29. Five of these eleven stations gained subscribers (all cable systems) equivalent to less than 10 percent of their respective home markets' television households. This means that in the case of these particular stations a dramatic increase in ratings (and financial performance) would not to be anticipated, because the additional carriage afforded to these particular stations involved only a small portion of the potential audience.

30. Thus, Ms. McLaughlin's simplistic attempt to show the absence of a relationship between must-carry and changes in these stations' market-wide audience ratings (and, by inference, their overall financial performance) is revealed as a seriously flawed research effort.

31. Ms. McLaughlin also attempts to dismiss the observed ratings gains among her sample stations by citation to the sampling errors in the audience data. McLaughlin Aff., ¶ 5. But as Dr. Rohlfs explains, the average increase in ratings among those stations for which a growth rate can be calculated is, in fact, both positive *and* statistically significant. Rohlfs Rebuttal Decl.

32. In any event, citation to statistical sampling errors, like other of her analytical techniques, simply flies in the face of standard broadcast industry practice. While advertisers and broadcasters alike are aware of potential ratings errors, they are accepted as existing systematically across all stations and television markets.

33. Hence, in the business world ratings numbers are taken at face value by advertisers and broadcasters alike, with little consideration given to any statistical margin of error: "advertisers pay on the numbers." The upshot is that when a commercial station experiences a ratings gain, it can charge more for advertising time, and thereby increase its revenues, regardless of whether the gain would be considered "statistically" significant.

Must-Carry's Benefits to the Added Stations' Financial Performance

34. Ms. McLaughlin next examines the changed financial status of *three* stations in her sample whose ratings increased after obtaining carriage on a Time Warner cable system. McLaughlin Aff., ¶¶ 15-18. She concedes that their financial condition improved after being added to the Time Warner systems, but concludes "that their improved financial condition is not clearly linked to the must-carry law." *Id.*, ¶ 18.

35. Using a large number of the stations from Ms. McLaughlin's own sample, I have no difficulty showing the undeniable relationship between changes in cable carriage, changes in audience ratings, and, ultimately, the financial performance of commercial broadcast stations. Eight of the stations in Ms. McLaughlin's sample are among those that I examined in my April 21, 1955 expert report (submitted as an attachment to my May 23 declaration), and for which I have precise cable subscriber figures, ratings, and financial data during the relevant time period.[6]

36. These data show that between 1992 and 1994 all eight of these stations experienced increased carriage as a result of must-carry (on both Time Warner and other cable systems). *See* Table C, hereto. The increases

[6] This is still a restricted sample of stations, but a signficant improvement over Ms. McLaughlin's sample of only three.

ranged from as little as three (3) percent of local television households in the case of WSFJ to as much as 43 percent in the case of WGTW. In three out of four cases there was a corresponding rise in the station's audience rating, by as much as 110 percent. None of these stations' ratings declined.

37. These stations also realized corresponding improvements in their financial performance. From 1992 to 1994, the period coinciding with the introduction of must-carry, all eight stations experienced increased revenues of between 14 and 50 percent. In each case the station's cash flow increased, on several occasions by more than 100 percent. *See* Table C.[7]

38. My earlier research on these stations revealed that between 1992 and 1994 there were no dramatic changes in their programming or other significant aspects of their operations. While the total level of broadcast revenues in their markets rose, this rise was less than the rate of revenue increases for many of the stations and far less than the rate of increase in the stations' cash flows. Thus, the only clear explanation for the stations' improved financial performance has to be the additional potential audience to which they gained access as a result of cable systems adding their signals in response to the must-carry requirements.

Defining Local: The Area of Dominant Influence

39. As noted above, defendants have also requested that I address plaintiffs' argument that it is inappropriate to use an "ADI" test to identify stations deemed "local" for must-carry purposes. Contrary to the plaintiffs' suggestions, the ADI test is completely appropriate to the goals that the must-carry rules are intended to serve.

[7] Several stations went from negative to positive cash flow. It is not possible in such cases to calculate a percentage change in cash flow, but it certainly represents a significant improvement.

40. When Congress reinstituted must-carry requirements in the Cable Television Consumer Protection and Competition Act of 1992, the new rules provided that a broadcast station could be eligible for mandatory carriage (if other statutory criteria were met) on cable systems within the station's Area of Dominant Influence ("ADI"), that is to say, its television market.

41. Television markets are defined along county-by-county viewership patterns throughout the continental United States. Each county is assigned to the market which is the home of the broadcast stations to which a majority of the county's households direct their viewing time. Currently there are 211 television markets, each shared by a number of broadcast stations. These markets are referred to by Nielsen as Designated Market Areas (DMAs), and, before it left the television ratings business, as ADIs by Arbitron.

42. For over 30 years, the national television rating services have calculated the audience levels of stations by measuring their viewership within their ADI. No useful ratings information is reported for most stations' viewership outside their ADIs, making the ADI a station's exclusive trading area. Because television advertisers apportion their advertising dollars based on stations' ADI ratings, these ratings are a primary determinant of the revenues a commercial station can earn from the sale of advertising time.[8]

43. It was therefore logical and appropriate for Congress to apply carriage requirements on an ADI basis, instead of the mileage criteria used in earlier regulatory versions of the rules, because (1) ADIs are based on the viewership patterns of television households, and (2) a station's advertising and program time revenues are largely

[8] Some religious stations also receive significant cash contributions directly from viewers. In general, sales of program time are not dependent on ratings.

determined on its audience ratings, and therefore cable carriage, within its ADI.

44. Congress reepated its endorsement of ADIs as an appropriate criterion for must-carry eligibility when it passed the Satellite Home Viewer Act of 1994, Pub. L. 103-369, 108 Stat. 3477, which amends the federal Copyright Act to eliminate certain financial barriers to the exercise of broadcast stations' must-carry rights.

45. Prior to the Satellite Home Viewer Act, if a cable system carried a station considered "distant," rather than "local" under the Copyright Act, then the cable system had to make royalty payments for distribution to the owners of the programs carried by the distant station. The must-carry rules provide that a cable system is not required to carry a station, even one within the same ADI, if the station is considered "distant" under the Copyright Act and does not agree to indemnify the system for copyright liability it would incur by carrying the station. *See* 47 U.S.C. § 534(h)(1)(B)-(ii).

46. As a result, many stations deemed "distant" for copyright purposes but wishing to exercise their statutory must-carry rights could not afford the copyright payments. According to a report by the House of Representatives, "[t]his anomaly place[d] the newer stations at a competitive disadvantage and in some cases ha[d] resulted in cable systems refusing to carry the newer stations, diminishing the amount of programming available to the public." H.R. Rep. No. 703, 103d Cong., 2d Sess. (1994).

47. Congress corrected this situation by amending the definition of a "local" station under the Copyright Act. Specifically, the Satellite Home Viewer Act 1994 amended the Copyright Act to provide that a station within the same ADI as a cable system would be considered local for copyright purposes, thus eliminating the problem of indemnification. In this fashion, Congress clearly re-

affirmed its commitment to the ADI as the appropriate measure of must-carry eligibility.

Conclusions

48. Ms. McLaughlin's conclusions about the lack of a relationship between cable carriage and audience ratings, between cable carriage and the financial vigor of broadcast television stations, are contrary to common sense, contrary to the experience of the broadcast television industry, and unsupported by her analysis.

49. Given the marginal "pre-must carry" financial performance of the commercial stations in Mis. McLaughlin's sample, including all of the "general independents," it seems highly likely that an abolition of the current must-carry regime, with the inevitable reduction in their cable carriage at least on Time Warner's systems, if not others, would lead to an almost immediate reduction in all of the stations' financial performance. For many of the stations examined by Ms. McLaughlin, the resultant loss of revenues and subsequent operating losses would likely lead to their economic failure.

50. Plaintiffs' complaints about the ADI definition of "local" stations are misguided. The ADI definition is consistent with the viewership choices of consumers and the realities of broadcast station economics.

June 15, 1995

/s/ David E. Schutz
DAVID E. SCHUTZ

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS REBUTTAL DECLARATIONS AND EXHIBITS

VOLUME VIII

* * * *

Dated: June 16, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

REBUTTAL DECLARATION OF JAMES N. DERTOUZOS

I, James N. Dertouzos, for my rebuttal declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I have reviewed the declaration of Stanley M. Besen submitted on behalf of plaintiffs. I have examined his data, econometric methodology, and interpretation of statistical results, and have concluded that there is no factual basis for his claim that, absent must-carry rules, significant numbers of broadcasters will not be denied cable carrige, and that cable system operators are not likely to be motivated by the intent to favor their own programming, or suppress potential competition in the local advertising market. In particular, D. Besen's analysis suffers from the following flaws:

a. Even setting aside the shortcomings in both his data and his econometric techniques, Dr. Besen misinterprets the statistical relationships he does observe. Specifically, he claims that his regression results show that carriage decisions of cable operators are *not* influenced by anti-competitive intent. In fact, his statistical results are completely consistent with that hypothesis. His results tell us only that one cannot *reject the possibility* that the number of ad-insertable channels on a system, and whether the operator has an equity interest in cable programming, have no impact on carriage of broadcast stations. But equally so, his results tell us that one cannot reject the

possibility that the number of ad-insertable channels, and programming interests, have dramatic effects on a station's odds of being carried.

b. In addition to the mistinterpretation of his own regression results, Dr. Besen relies on data which does not measure the variables whose relationship to station he seeks to observe. He purports to measure the incentive to diminish local broadcast competition by the number of channels on a cable system that are capable of carrying local advertising inserts. his measure bears little relationship either to the volume of advertising sales earned by local cable operators, or, for that matter, a cable system's incentive to suppress local broadcast competitors (particularly in the future) in order to increase these sales.

c. Dr. Besen's econometric techniques are also flawed. He claims to observe that cable operators base carriage recisions almost entirely on the popularity of the programming offered, and not on other factors. Aside from the fact that most o fthe stations dropped have ratings that compare favorably with all but the most popular cable nuetworks, Dr. Besen's tabulation of station carriage (Besen Decl. at 28) is misleading because it does not account for other potentially important factors (such as the number of local stations, network affiliation, and signal strength) that affect carriage decisions. *See* ¶¶ 16-18, below. His regression framework (Besen Decl. at 50), in particular, is inadequate for the additional reasons that he does not account for the reverse causality between carriage and ratings; that is, he does not account for the fact that by November, 1994, the low ratings of some stations may be a lingering effect of previous non-carriage.[1]

[1] Dr. Besen claims that the use of 1994 ratings data controls for this effect, however, it is unreasonable to assume that the ratings of stations acquiring carriage in mid-to-late 1993 would adjust in just a few short months. Below, I utilize a standard econometric methodology to account for the probability that ratings and carriage are jointly determined.

These difficulties of data and methodology render Dr. Besen's analysis virtually useless.

d. I executed a more complete model of station carriage which shows factors other than ratings are important to the carriage decisions of cable operators, including the number of local stations available, network affiliation, signal strength, and whether the sation is VHF or UHF. The results of this model also show that one cannot reject the hypothesis that the number of ad-insertable channels, and whether the operator has programming interests, exert a powerful influence on a station's chances of obtaining cable carriage.

e. Dr. Besen argue that most local broadcast stations having the vast majority of viewing audiences are already carried by cable operators. But although most VHF stations in Dr. Besen's database were carried, significant numbers of UHF stations of all types were not available except over the air. In fact, Dr. Besen's data show that about 80 percent of all viewers reside in geographic areas in which at least one over-the-air station is not carried by the local cable operator. Furthermore, by using wide geographic areas and audience ratings from narrow time periods, Dr. Besen has significantly understated that relative importance of excluded television stations to local communities and niche markets.

f. Using Dr. Besen's own data, it is possible to demonstate the devastating impact on broadcast television stations' audience when they are not carried by cable systems. Clearly, as competition for advertising dollars carriage to broadcast stations that cannot access a large intensifies in the future, cable operators will wish to deny audience in the absence of a strong over-the-air signal.

2. Data and statistical analysis in support of these conclusions are provided in Tables A-1 through A-7 of the attached appendix. For the most part, data employed were identical to those analyzed by Dr. Besen. These data

were supplemented by information on station characteristics, including network affiliation.[2]

3. Dr. Besen performs a series of regressions that relate the probability of a station being carried to several independent variables, including the number of channels on the system that are capable of carrying local advertising inserts, and whether the operator is one that also has equity interests in cable programming. Setting aside the shortcomings of both his data and his regression framework, which I diccuss below, Dr. Besen misinterprets his own regression results.

4. The regression is intended to express, among other things, the relationship between the probability of station carriage and the number of ad-insertable channels by estimating a co-efficient, a number which, when multiplied by the number of ad-insertable channels on the system, predicts the impact of ad-insertability on the stetion's chances of being carried.[3] Thte co-efficient that Dr. Besen estimates, that is to say, the impact of ad-insertability on the odds of station carriage, is *not* zero. Likewise, his estimated relationship betwen the odds of station carriage and programming interests is different from zero.

5. However, the regression also calculates standard errors—the margin of error, in layman's terms—for each of his estimated co-efficients. In statistical terms, while we cannot be sure that the estimated value of the co-efficient is its true value, we can be 95 percent certain that the true value lies somewhere in a range (the con-

[2] The measure of audience share was the variable utilized in connection with Dr. Besen's expert report submitted on April 21, 1995. The qualitative results reported here are not affected by the use of alternative measures.

[3] To be precise, the co-efficient multiplied by the number of ad-insertable channels predicts the impact on the expression log (p/(1-p)), where "p" is the probability of carriage. Given this information, it is a straightforward matter to calculate the estimated impact on the probability of carriage itself.

fidence interval) equal to the estimated value of the co-efficient plus or minus the standard error.

6. For example, in Table A-2 I have set forth Dr. Besen's estimate of the relationship between ad-insertable channels and the carriage probability of a UHF station (.0073). The standard error is .0502, meaning that the true value of this co-efficient almost certainly lies between a lower bound of −.0429 and an upper bound of .0575 (.0073 plus or minus. 0502). One cannot reject *any* value within this interval as the true value of the co-efficient.

7. In the case of both ad-insertability and programming interests, Dr. Besen observes that the margin of error for his estimated co-efficients is greater in absolute terms than the estimates themselves. This means that zero (no impact on the odds of station carriage) falls within the confidence intervals for both co-efficients. As Dr. Besen correctly concludes, this result means that one cannot *reject* the possibility that the true value for these relationships (that the impact on the chances of carriage) is zero. Deposition of Stanley M. Besen dated May 11, 1995 (DAE OL. IV.A, Exh 1) at 130, 161.

8. It is at this juncture, however, that Dr. Besen makes a critical mistake. He interprets the foregoing results as proof that cable operators' carriage decisions are *not* motivated by anti-competitive intent. Besen Decl. at 51. But this conclusion does not follow from his results. Just because one cannot reject the possibility that the true value for these relationships is zero, that does not mean that they *are* zero. Indeed, as stated above, one cannot reject *any* value within these confidence intervals as being the true impact of ad-insertability, or vertical integration, on a station's chances of being carried.[4]

[4] This proposition is fundamental to elementary statistics. Virtually all elementary textbooks make this theoretical point. *See*, for example, Sanford Weissberg, *Applied Linear Regression*, (2d ed.); Edwin Mansfield, *Statistics for Business and Economics:*

9. In fact, far from compelling the conclusion that ad-insertability and vertical integration have no impact on carriage recisions, Dr. Besen's results are just as consistent with the opposite conclusion, namely that the effects are quite large. In Table A-2 I have set forth Dr. Besen's coefficient estimates, and calculated the confidence intervals suggested by the standard errors for those co-efficients reported in Exhibit C-14 to Dr. Besen's declaration. The estimates represent the most likely values of these co-efficients, and the confidence intervals represent the bounds within which we can be 95 percent certain that the true value lies. Since the value zero is within the interval in all four cases reported, one cannot reject the possibility that the true value is zero. However, one cannot reject any other value within the same interval.

10. To demonstrate that, based on Dr. Besen's own analysis, the influence of ad-insertable channels and programming interests could be quite large, I estimated the impact on the chances of station carriage under a number of scenarios. For example, completely consistent with Dr. Besen's results, the probability of a PBS station not being carried could increase from 22 percent, when a cable system has no ad-insertable channels, to 65 percent (a 195 percent increase) when the system has 19 ad-insertable channels (the maximum number among the sample systems). For UHF stations, the increase is from 29 to 51 percent, that is, a 76 percent increase in the probability of not being carried. When the system has programming interests, the odds of non-carriage for a PBS station in-

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Methods and Applications, (4th ed.); Robert S. Pindyck and Daniel L. Rubinfeld, *Econometric Models and Econometric Forecasts* (3d ed.); and Carl N. Morris and John E. Rolph, *Introduction to Data Analysis and Statistical Inference*.

For a useful discussion of how inappropriate policy conclusions can be drawn when these basic principles are not applied, *see* Steven P. Millard, "Environmental Monitoring, Statistics, and the Law: Room for Improvement," *American Statistician* (Nov. 1987).

crease by 45 percent; and for a UHF station they increase by 17 percent.

11. This is not to say these increases do or will occur. But the possibility is not rejected by Dr. Besen's results. Clearly, these results are just as consistent with the theory (not to mention the wealth of information discover in this case) that anti-competitive incentives heavily influence carriage decisions.

12. In addition to misinterpreting his own results, Dr. Besen relies in the first place on data that do not measure the variables whose impact on station carriage he purports to analyze. In Table A-1 Dr. Besen's data on the number of ad-insertable channels is compared with information on actual advertising revenues provided by the FCC.[8] These data are organized by system size to control for sampling differences.

13. Clearly, the measures are not comparable. For systems having fewer than 500 subscribers, 20 percent have ad insertion capability, according to Dr. Besen's data (drawn from an NCTA survey of cable operators). Att the same time, only four (4) percent of respondents to the FCC survey in that same size category reported any advertising revenues. On the other hand, 100 percent of the NCTA/Besen system operators in the largest size category had the capability to insert advertising. However, only 73 percent of these large operators had reportable advertising revenues during the 1992 fiscal year. For purposes of the relationships that Dr. Besen sought to analyze, the number of ad-insertable channels on the system was not an acceptable proxy for the volume of local advertising in which the system actually engaged.

14. Indeed, previous reaserch I have conducted shows that the capability of inserting advertising on numerous

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[8] *See* Declaration of James N. Dertouzos on Behalf of Defendants for a description of the FCC data base.

channels is more a function of a system's installed technology, and is more highly correlated with channel capacity, number of subscribers, and other features such as fiber optics and addressability than it is with volume of advertising dollars earned by the system.[6] Cable systems rarely market more than 8-12 channels for ad insertion, even when they are capable of inserting advertising on as many as 19 or 20.

15. In addition, while Dr. Besen makes much of his observed correlation between carriage decisions and TV station ratings, because of the shortcomings in his analytical techniques, his station carriage analysis (Besen Decl. at 28) and his regression (*id.* at 50) also suffers from serious defects.

16. Essentially, Dr. Besen fails to observe that carriage decisions are correlated with a number of other variables as well. For example, I tabulated the percent of stations carried by cable systems in the Besen sample according to the number of local stations available. Table A-3. We can see that where there are fewer than three (3) local stations, cable operators choose to carry all stations. In contrast, when there are 12 or more signals, only 72 percent are carried.

17. In fact, since most systems are located in communities with more than a minimum number of television broadcast signals, the vast majority of operators choose to deny carriage to one or more local stations. Calculations based on the Besen data indicated that systems serving about 80 percent of the nation's subscribers are carrying less than the full slate of available broadcast signals.[7]

[6] For example, regressions I have performed indicate that about 70 percent of the variation in the number of ad-insrtable channels can be explained by system capacity, number of subscribers, and whether the system is owned by an MSO.

[7] This estimate was derived by organizing the Besen data on a system basis, calculating the number that failed to carry at least one local station (based on the joint 50-mile/ADI rule) and deriving projections for the complete industry. Since there was not a strong correlation between system size and the number of signals available, the same reflects the industry distribution quite accuracy. Since cable penetration is typically lower in markets served by numerous stations, greater than 80 percent of the nation's television audiences are probably affected by a cable system's decision not to carry a signal.

18. Table A-4 presents Dr. Besen's carriage data sorted according to station characteristics such as network affiliation and signal type (VHF/UHF). Clearly, even though most stations are carried, certain categories are much less likely to gain access to cable subscribers. For example, in 1992 cable systems in Dr. Besen's sample carried stations only 56 percent of the time.

19. Finally, Dr. Besen's analysis does not speak to the incentive to drop stations either now, or in the future, when advertising revenues become more important as sources of income. It is not the total volume of dollars presently earned, but the potential increase in ad revenues to be gained by diminishing the actual (or potential) competition of a broadcast station. Table A-7 reports the results of additional regressions I ran to observe the relationship of audience share to explanatory variables as signal type and network affiliation. Also included in the model is whether the station is carried by the cable operator. To account for the possibility that November, 1994 ratings still might reflect the lingering effect of non-carriage, predicted values for carriage were derived using a linear probability model where carriage was based on the variables included in the Besen model.

20. The results indicate that a lack of cable carriage can have a dramatic effect on ratings, decreasing the ratings of stations in the Besen sample on average by 66 percent. At the outset this decline can be attributed to the loss of audience in cable households. However, it is likely that as the initial loss of cable audience impacts upon the station financially, making it difficult for a sta-

tion to invest in programming, subsequent reduction in *non*-cable audience can be expected as well. This results in additional programming reductions, and a continuing spiral of decline for cable and non-cable audiences.

21. In sum, Dr. Besen's analysis does not refute the conclusion that cable systems have strong and increasing incentives to deny carriage to certain broadcast stations, nor the evidence that that cable carriage considerably enhances the prospects of these stations to improve the service offered to non-cable households.

June 16, 1995

/s/ James N. Dertouzos
JAMES N. DERTOUZOS

* * * *

Table A-3

Correlation Between Number of Stations and Percent Carried

Number of Local Stations	Percent Carried
Less than 3	100%
3 or 4	94%
5	90%
6	88%
7	86%
8 to 11	79%
12 or greater	72%

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

MEMORANDUM OF DISCOVERY COMMUNICATIONS, INC. IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

* * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SUPPLEMENTAL AFFIDAVIT OF JOSEPH STERN

I, Joseph Stern, declare on the basis of my own personal knowledge and expertise in the area of broadcast transmission and reception as follows:

Declaration of Eldon J. Haakinson

1. I have read the Declaration of Eldon J. Haakinson submitted in this case, *Turner Broadcasting System, Inc. et al. v. Federal Communications Commission, et al.*, as well as the transcript of Mr. Haakinson's deposition and Mr. Haakinson's initial expert report. Although Mr. Haakinson is undoubtedly an expert in the field of signal propagation, Mr. Haakinson is clearly not an expert in the areas of consumer electronics, consumer television receiving antenna design and installation, and consumer attitudes regarding picture quality. Due to Mr. Haakinson's lack of knowledge and qualifications on those subjects, his declaration contains a substantial number of erroneous or unsupported statements, the most important of which I discuss below.

2. At paragraphs 10 and 33 of his declaration, Mr. Haakinson states that in each service area, the FCC assumed the consumer would have an outside antenna located at 30 feet above ground level. This statement is incorrect. In reality, the FCC assumed that there would be variations in locations and types of antennas, and the TASO report referred to in my initial affidavit herein and subsequent FCC investigations demonstrated that a viewer

did not necessarily need an outside antenna 30 feet above ground to receive an acceptable picture. Indeed, as I discussed in paragraphs 24, 33, and 34 of my initial affidavit, a substantial percentage of viewers within a station's Grade A contour can receive an acceptable picture through the use of an indoor antenna alone.

3. In paragraphs 15-17 and figures 1-6 of his declaration, Mr. Haakinson employs terrain-dependent propagation model maps to estimate predicted television coverage for what he considers representative United States cities—Chicago, San Francisco and Denver—and compares his results with predicted television coverage maps developed using FCC Broadcast Curves. He then concludes that use of the FCC Broadcast Curves often overestimates the predicted coverage of broadcast signals. This conclusion is incorrect for a number of reasons. First, San Francisco and Denver, with their rugged terrain features and mountainous areas, can hardly be termed representative of cities nationwide, because there are relatively few cities with extremes of terrain similar to that of San Francisco and Denver. Moreover, in non-mountainous areas, which are geographically representative of the majority of United States land mass conditions, adequate signals are received at the FCC predicted Grade B contour, as well as at considerable distances beyond the grade B contour. Second, Mr. Haakinson's own comparison and calculations demonstrate that, in the case of Chicago, whose terrain features are more representative of the majority of the United States than either San Francisco or Denver, use of the FCC Broadcast Curves actually *underestimates* projected coverage. Third, the terrain-dependent models ignore the fact that transmitted television signals bend and reflect off of geographical and man-made obstructions. It is common for viewers in canyons, whether natural or man-made, to receive their television signals via a reflection or "bounce" off a nearby mountain or building. Some examples of the success of such reception methods are included in the

report of the FCC UHF-TV study in New York City.[1] Furthermore, the FCC Broadcast Curves are the accepted method of predicting coverage in the broadcast and advertising industries, because they take into account a large number of variables in propagation and reception conditions. The FCC Broadcast Curves recognize that there are no absolutes in forecasting propagation and reception—that is why they are based on 50% of the time, 50% of the locations.

4. In paragraph 18 of his declaration, Mr. Haakinson states that most people have observed "ghosts" on over-the-air television and asserts that "ghosting" or multipath frequently prevents viewers from receiving pictures of acceptable quality. Based on my experience in the broadcast industry, it is my opinion that although ghosting exists on a site specific basis, it is not a major factor in television reception nationwide. Furthermore, in recent years, there have been significant technological advancements in reducing the effects of multipath. Many of the newer television receivers, manufactured in 1993-95, incorporate ghost cancellation circuits that minimize picture disturbance even in areas of severe multipath.

5. Also in paragraph 18, Mr. Haakinson cites Chicago and New York as dense urban areas where tall buildings often block or cause multipath problems for broadcast reception and asserts that the received signals do not provide a picture of acceptable quality. While tall buildings can block direct line-of-sight between the transmitting and the receiving antennas, based on my personal experience in constructing and operating television broadcasting facilities in both Chicago and New York, it is common for viewers in such urban areas to receive broadcast sig-

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[1] *Report On Mobile Field Strength Measurements, New York City UHF-TV Project*, FCC TRR Rep. No. R-6302, Feb. 12, 1963; Jules Deitz, *Report On Receiver Installations*, New York City, UHF-TV Project, presented at Radio Fall Meeting, IRE, Toronto, Nov. 14, 1962.

nals via a reflection or bounce off of a nearby building, thereby enabling reception of acceptable quality. Indeed, there are large numbers of non-cable households in both cities that are perfectly satisfied with their reception of broadcast television.

6. In paragraph 19, Mr. Haakinson states that there are areas of unacceptable signal quality due to multipath within the Grade A contour and that studies have been performed which indicate that even weak multipath levels affect picture quality as perceived by viewers. I disagree with Mr. Haakinson's implications regarding multipath effects on picture quality and with his statement that multipath presents a significant impediment to quality reception. First, the suggestion that rather weak multipath levels per se have a serious effect on picture quality is unfounded. Based on my personal experience in participating in numerous multipath impairment annoyance studies, the seriousness of the effect on picture quality is dependent on a combination of a number of elements, including picture content, the time displacement of the reflected signal, and the amplitude of the reflected signal. Second, in 1962, the FCC conducted a study of television receiving conditions within 25 miles of the Empire State Building, where virtually all New York City television stations' transmitting antennas were located at that time, and where significant multipath existed due to the many large buildings. The results of the study indicated that approximately 90% of all viewers employing indoor or outdoor antennas, enjoyed a level 3 (defined by TASO as "passable"—picture of acceptable quality) or better, despite the effects of multipath and noise. *Report on Mobile Field Strength Measurements, New York City UHF-TV Project*, FCC TRR Rep. No. R-6302, February 12, 1963; Jules Deitz, *Report on Receiver Installations*, New York City UHF-TV Project, presented at Radio Fall Meeting, IRE, Toronto, November 14, 1962. Based on this study and my experience in the broadcast industry, it is my opinion that multipath does not create a significant impediment to nationwide quality reception within the Grade A contour.

7. In paragraph 20 of his declaration, Mr. Haakinson quotes an NTIA report regarding measurements of multipath interference taken by ITS in Denver. I disagree with Mr. Haakinson's use of the quote from the Denver report, because there is no data in the report showing the nature and extent of the measurements made which formed the basis for the conclusions quoted by Mr. Haakinson. For example, there is no indication as to how many sites were measured, whether the sites were all within multipath areas, or whether the measurement sites were evenly distributed over the viewer distribution. There is no indication as to whether the measurers probed the room where the television receiver was located to obtain the best quality reception. In summary, there is simply no indication as to the reliability of the information. Furthermore, the phrase in the quotation stating that there was more multipath with omnidirecitonal antennas than otherwise is of little consequence, because, in the real world, omnidirectional antennas are not used where there is significant multipath.

8. In paragraphs 21 and 22, Mr. Haakinson cites a study performed by Jules Cohen & Associates, submitted on behalf of the Television Operators' Caucus in MM Docket No. 85-349, as corroboration of his previous statements regarding shadowing and multipath. I disagree with the findings of the Jules Cohen study, including those quoted by Mr. Haakinson, for the reasons stated in paragraph 25 below.

9. In paragraph 23 of his declaration, Mr. Haakinson recites data from a report prepared to determine the performance of the proposed high definition television (HDTV) service as compared with the NTSC television service now in use. Mr. Haakinson's reliance on this data is misplaced for two pivotal reasons. First, the data is based on signal transmissions made at power levels 10 db

below the authorized maximum power, a reduction that, in my experience, would be expected to produce poorer reception. Second, the study was narrowly designed to measure only comparative data between the HDTV and NTSC transmissions, and not to offer absolute data relative to NTSC television transmission and received picture quality, the purpose for which Mr. Haakinson misappropriates the data.

10. In paragraph 24 of his declaration, Mr. Haakinson states that the combination of the information contained in the ITS multipath study (his paragraph 20), the information contained in the Jules Cohen field survey, and the HDTV measurements, all of which I have discussed above and noted Mr. Haakinson's misplaced reliance upon, support his assertion that viewers are significantly limited in receiving quality pictures over-the-air. The fact that at least 36 million television households now receive television signals over-the-air through the use of either indoor or outdoor antennas (see my initial affidavit at ¶ 21) refutes Mr. Haakinson's assertion.

11. In paragraph 26 of his declaration, Mr. Haakinson states that "many" locations will experience blockage of signals caused by terrain or buildings. As he admitted in his deposition (pp. 89-90), Mr. Haakinson is wholly unable to quantify what he means by "many" and, to the extent he is relying on the work of others, that reliance is misplaced as I have shown at paragraphs 7-10 above.

12. In paragraph 27 of his declaration, Mr. Haakinson states that receiving a high-quality television signal through an antenna is "still often a challenging and troublesome endeavor." Based on my experience, I do not consider that going to a store, buying an antenna, installing it and tuning to a television station is a challenging and troublesome endeavor. As further evidence, as stated above, at least 36 million households currently receive television over-the-air, thus having apparently overcome this "challenging and troublesome" endeavor.

13. In paragraph 34 of his declaration, Mr. Haakinson cites two reports written by ITS (a Division of NTIA) in concluding that "home owners commonly have gain values below those assumed by the FCC" and that "[a]s a result, those viewers may not achieve sufficient receiving system gain to obtain a signal of the quality predicted by the FCC." I disagree with the implication that homeowners commonly do not have sufficient gain to obtain quality pictures. First, NTIA Report 79-22, prepared sixteen years ago, is not representative of present day antennas and the data therein should not be extended to the present without new measurements. Second, NTIA Report 81-68, prepared fourteen years ago, is flawed for the reasons I explain in ¶ 15 below.

14. In paragraph 35 and table 3 of his declaration, Mr. Haakinson implies that some unspecified number of viewers will, in some instances, choose the "worst configuration" of signal reception components. This does not make sense. If viewers have less than quality reception because of the equipment configuration they choose, they have the option of correcting that configuration. Mr. Haakinson himself admits that consumer information is available to assist the homeowner in selecting the proper antenna and related equipment. Obviously, if a viewer installs an antenna incorrectly or employs an antenna which is not adequate given the locality, reception will suffer. This is easily correctable and, given the "best configured" gains in Mr. Haakinson's Table 3, quality reception was clearly obtainable in 1979. Even better reception is available today because, contrary to Mr. Haakinson's unsupported speculation, there have been substantial improvements in TV receiving antennas and tuners as described in paragraphs 27 through 32 of my initial affidavit.

15. In paragraphs 36 and 37 of his declaration, Mr. Haakinson relies on NTIA Report 81-68 (R.D. Jennings, "Television Field Strength and Home Receiving System

Gain measurements in Northern Illinois" (1981)), to extrapolate across the United States the figures gathered from measuring 50 homes in the Chicago-Peoria area. Although I do not represent myself to be a statistician, I have worked with statistics and statisticians, and I have performed work preparing field intensity surveys for many stations. Based on my experience working with statistics and field studies, I am of the opinion that a 50-home study in the Chicago-Peoria area is not a statistically valid sample regarding television receiving antenna gain across the United States. In his deposition (pp. 129-30), Mr. Haakinson essentially admitted this. The authors of the study themselves noted that the "measured data may contain bias . . . due to our suspicion that homeowners who felt they might have an antenna system problem were more cooperative with our field measurement program than were homeowners who apparently recognized no deficiency in their TV reception." Furthermore, the authors recommended that a study should be undertaken to determine the performance of television antenna system components; I am unaware of any such study subsequently being undertaken. Thus, Mr. Haakinson's reliance on the Chicago-Peoria study to assert that receiving antenna gain and/or reception quality across the United States is inadequate, is without basis.

16. In paragraph 40, Mr. Haakinson lists several reasons why home viewers are unable to have antennas outside of their home. No quantification of the number of TV households affected is given. In response to Mr. Haakinson's five bullet points, it is my opinion, based on my experience in television broadcasting and reception and on research regarding antenna installation restrictions, that his statements are without adequate basis and simply not true. I address each of Mr. Haakinson's five bullet points below:

a. *Apartment Buildings and Condominiums.* When individual outdoor antennas are prohibited in

apartment and condominium situations, a master antenna is typically provided for use by all residents.

b. *City Ordinances.* I am aware of no city ordinances that prohibit installation of outdoor television antennas and neither is Mr. Haakinson. (Depo. at 174).[2]

c. *Neighborhood and Development Covenants.* Mr. Haakinson's footnote 17 cites Ms. Debra Bass of the Community Association Institute as stating that 80%-90% of the 11.6 million households belonging to home-owner, cooperative, or condominium associations are subject to restrictive covenants limiting the use of outdoor broadcast receiving antennas. During a telephone conversation that I had with Ms. Bass on June 1, 1995, she stated that the 80%-90% figure she gave Mr. Haakinson was merely "her feeling" of the circumstances and not based on any empirical data. She further stated that many of the households subject to these restrictions have access to a master antenna, in the way that apartment building and condominium dwellers do.

d. *Man-made or Terrain Obstructions.* If complete blockage of the signal exists and there is no reflected signal available, then there is no point in putting up an antenna, whether the viewer has cable television and an A/B switch or whether the viewer has no cable.

e. *Installation Problems.* The phenomenon of home viewers being unable to have outside antennas because of a difficult transmission line is, by no means, a frequent occurrence. In fact, in my ex-

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[2] Mr. Haakinson may have mistakenly relied on the fact that some cities have ordinances barring the erection of large C-Band satellite receiving antennas to infer incorrectly that television receiving antennas were barred, as well.

perience, I have never heard of a transmission line problem, mounting problem or "hazardous installation" problem that prevented outdoor antenna installation and neither has Mr. Haakinson (Depo. at 177-81).

17. Also in paragraph 40 of his declaration, Mr. Haakinson relies on ITS measurements in 1981 at *two* homes in the Chicago-Peoria area to extrapolate figures throughout the entire Chicago-Peoria area and to suggest their relevance across the United States. For obvious statistical reasons, Mr. Haakinson's extrapolation is flawed. Moreover, based on my experiences with antennas, it is my opinion that the indoor antennas used by those two homes, which are identified in NTIA Report 81-68, are not quality indoor antennas. Those two homes used a $1.00 wire loop for UHF reception, which was one of the cheapest and worst possible choices of antennas available at that time. The indoor antennas tested by NTIA in an earlier study (NTIA Report 79-28) or the indoor antennas used by the FCC in its 1962 tests would have provided much better reception. For these reasons, Mr. Haakinson's use of the "25 db" change in performance is simply without basis. Moreover, it is preposterous to assume that all viewers would be "forced" to rely on indoor antennas rather than outdoor antennas. There is no basis for such an assumption.

18. In paragraphs 41 and 42 of his declaration, Mr. Haakinson concludes that "the average TV home viewer is at a disadvantage to provide and maintain an adequate receiving system" and that "[m]any home viewers fail to properly install and maintain outside antenna installation, and others are unable even to provide an outside antenna." For the reasons stated above, I disagree with these statements.

Defendants Joint Statement of Evidence Before Congress (JSCR)

19. I have read paragraphs 718-770 of Defendants' Joint Statement of Evidence Before Congress (JSCR) filed by the Department of Justice on May 26, 1995. Based on my experience in television broadcasting and television signal reception, it is my opinion that a significant amount of this evidence is incorrect and/or without basis. The issues that I deem most important are listed below.

20. JSCR paragraph 724 contains a statement that "some communities have zoning regulations which, for aesthetic reasons, bar the erection of external television antennas." The number of communities represented by the word "some" is not quantified and no basis is given for this ambiguous statement. In my experience, communities that have zoning regulations for aesthetic reasons generally bar or restrict the erection of large amateur radio arrays or C-Band satellite receiving dish antennas and not television receiving antennas. Further, as I stated above (¶ 16), apartment houses and condominiums that bar the installation of individual television receiving antennas usually provide a master antenna for use by its residents, thereby obviating the need for an individual antenna while providing all of the service that would have been provided by an individual antenna.

21. JSCR paragraph 727 references a number of communities which purportedly either prohibit outdoor antennas, require written approval by a board or committee or require a permit and payment of a fee before erection of an outdoor antenna. In my experience, most planned communities that restrict the installation of individual television receiving antennas provide a master antenna which serves the same function as an individual outdoor antenna.

22. The document referenced in JSCR paragraph 727, "Comments of the National Association of Broadcasters"

in MM Docket No. 85-349 at 22, lists a number of communities that supposedly restrict the installation of television receiving antennas. Whatever the accuracy of that list may have been in 1985 when it was made, based on my independent research, I found that several of the communities listed in that document do not, in fact, have such restrictions in place today. Beaumont, Texas, for example, does not require a permit to install a television receiving antenna nor does it have any restrictions on television receiving antennas.[3] Similarly, Medford, Oregon, does not require a permit nor a fee to install a television receving antenna nor are there any governmental restrictions on residential television antenna in the City of Medford.[4] And the City of Danville, Virginia, no longer places restrictions on installation of a television receiving antenna.[5]

23. JSCR paragraph 728 quotes a portion of a Jules Cohen & Associates Engineering Study, with which I disagree for the following reasons:

a. First, the statement is made that "the effort needed to provide the ability to switch from cable to antenna is often beyond the capability of the householder." There is no indication that a householder or a professional installer could not undertake to install the device(s) necessary to switch from cable to off-air reception.

[3] Source: Telephone conversations (June 12, 1995) with Mr. Murray Duren, Planner, City of Beaumont, TX, and with Mr. Fred Lemell, Division Head, Building Codes Division, City of Beaumont, TX.

[4] Source: Telephone conversations (June 12, 1995) with Mr. Ron Gapp, Technician, Medford City Building Department, and Mr. Michael Walter, Assistant Planner, Planning Department, Medford, OR.

[5] Source: Telephone conversations (June 12, 1995) with Mr. Charles Norton, Enforcement Officer, Uniform Building Code, Community Development Office, City of Danville, VA and Mr. Bob Saul, City Attorney, Law Department, City of Danville, VA.

b. Second, the suggestion is made, without any foundation, that it may be difficult to provide a satisfactory switching system for indoor antennas. In my experience, and from discussions with indoor antenna manufacturers,[6] it is not difficult at all.

c. Third, the engineering study suggests that a transmission line installed by a householder would be wrapped around the metal supporting mast twice. This directly contradicts standard instructions packed with an antenna and/or an antenna mounting kit. The study further suggests that such improper action would cause a loss of signal which would not only negate all of the 3.9 db gain of the antenna, but further reduce the signal level to approximately 6 db below that of a dipole. The suggestion that householders and/or professional antenna installers possess such a high degree of incompetence is without basis. Every supplier of antennas and antenna mounting hardware offers for sale special standoff supports specifically designed to hold the twin-lead antenna wire away from metal objects. Additionally, it must be assumed that the householder or professional installer will possess at least sufficient competence to determine if the resultant picture quality is acceptable and, if not, to take corrective action.

d. Fourth, the indoor antenna gains cited in the engineering study do not take into consideration the amplified indoor antennas now available at modest cost. The study suggests that indoor antennas have gains varying between 10 db and 30 db below the gains of outdoor antennas; that the poorest quality antenna would be used; and that the resultant pic-

[6] Tandy Distribution Products engineers stated that it would be a very simple and inexpensive process to add an A/B switch to the base support of a number of the amplified indoor antennas now being manufactured at their factories (Telephone interview, April 1995).

tures would be TASO grade 4 or grade 6. In reality, if the indoor antenna gain is only 10 db less than the outdoor antenna, the TASO grade of the television picture quality would be Grade 3 (passable), or Grade 2 (good). If an amplified indoor antenna were to be used, the picture quality would be even better.

e. Fifth, the engineering study claims that cable systems are generally located in towns or cities, where man-made obstructions are prevalent, and not in sparsely populated rural areas. The study states that these man-made obstructions, notably present in large cities such as New York City, provide substantial shadowing of many receiving locations, reducing signal strength and, consequently, picture quality. I disagree with this assessment. Approximately 40% of all cable systems are located in suburban and rural areas. Furthermore, the previously cited FCC UHF-TV Study showed that 90% of all New York City test viewers enjoyed a picture quality of TASO Level 3 or better.

f. Sixth, the engineering study reported a survey that showed very poor performance of indoor antennas and suggested that this is the norm. These results, however, are skewed because the study made use of the most inexpensive and poorest quality indoor antennas available, choosing to forego testing with far superior indoor antennas available at the time, such as those used by the FCC in their UHF-TV New York City Study cited above. Modern indoor antennas are of even higher quality and, in addition, amplifiers may be added to improve reception further.

g. Seventh, the engineering study reported that more than 80% of UHF observations suffered significant degradation and more than 75% of VHF

observations were similarly affected. Again, the survey made use of poor quality antennas. Furthermore, the study is misleading because it contradicts the accepted practice of other researchers in the field by labeling TASO Grade 3 (passable) picture quality as "significant degradation."

24. JSCR paragraph 729 states that, "In communities of all sizes across the nation, outdoor antennas are prohibited or restricted." No basis is provided for such an all encompassing statement. As discussed in numerous places above, this statement is incorrect.

25. JSCR paragraph 731 states that in San Diego, California "85% of all homes have been built with zoning regulations, restrictions and/or covenants that prohibit the ability of residents to put up outside antennas." (The source document indicates that it is referring to the San Diego ADI and to a time period dating back to 1980.) I disagree with this statement based on the following research information. First, in the City of San Diego, about 50% of the residents live in PRDs (Planned Residential Developments), which generally prohibit exterior antennas. The City Department of Development and Environmental Planning provides a model permit for use by PRDs which states that, with a restriction prohibiting outdoor antennas, *one master antenna will be allowed.* For the rest of the City, there are no restrictions on the use of exterior antennas.[7] Second, The County of San Diego has no restrictions on outdoor antennas that go no higher than 200 feet above ground. Within the County, PRDs may restrict outdoor antennas; however, the County may require the installation of a master antenna.[8] Third, in the City of El Cajon, the 5th largest city in San Diego

[7] **Source: Telephone discussion (6/12/95) with Karen Lynch-Ashcraft, Telecommunications Planner for the Department of Development and Environmental Planning.**

[8] **Source: Telephone conversations (6/12/95 and 6/13/95 with Michael Sloop, Land Use Planner, County Department of Planning and Land Use.**

County, there are no restrictions on outdoor antennas. However, some PRDs have CC&Rs (Conditions, Covenants and Restrictions) prohibiting outdoor antennas, but not precluding master antennas. The City does not enforce CC&R deed restrictions since they are recorded with the County. The Director of Planning estimates that approximately one-sixth of the dwelling units in El Cajon may have restrictions on outdoor antennas.[9]

26. JSCR paragraph 733 repeats the information in paragraph 731, with which I disagree, as noted above.

27. JSCR paragraph 734 cites a review of all deed restrictions recorded in Collin County, Texas, which included 35 CC&R documents for residential developments recorded in the eight to nine month period from June 1986 to March 1987. It indicates that 9 had no restrictions at all, 10 permitted one antenna, 5 imposed what the author considered "severe" height limitations of five feet above the roof line (in fact, this is not a "severe" limitation, since 5 feet above the roof line is a normal height for installation of a TV receiving antenna), and only 11 prohibited all outdoor antennas. This data shows that 24 of the 35 CC&R documents permitted individual television receiving antennas; while 11 others prohibited individual outdoor antennas, there is no indication whether there was any bar against installation of master antennas. Furthermore, I question the relevance of this data which relates to a brief period in 1986-1987 and does not indicate a pattern or trend in any direction.

28. JSCR paragraph 735 states that "outdoor antennas were effectively barred by deed restrictions, in 14 of 18 new housing developments in Contra Costa County (CA)." This statement is misleading because the same statement also says that 9 of the 18 permit outdoor antennas. In addition, no mention is made as to whether or not a master antenna is or can be provided.

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[9] Source: Telephone conversations (6/13/95) with Jim Griffin, Director of Planning, City of El Cajon.

Brief Of Public Broadcasters

29. I have read the brief of the Public Broadcasters which, on page 72, states that poor reception of some cable channels is one of the factors that may reduce viewership of repositioned public broadcast stations. In electronic terms, there is no variability in the reception or the quality of transmission of different cable channels. The operational equipment of a cable television system includes automatically controlled amplifiers and equalizers specifically designed to insure that each of the channels carried on the cable has the same transmission characteristics. Moreover, the normal maintenance procedures used in cable television systems include periodic measurements of the transmission characteristics and field adjustments, when necessary, to "balance" the system transmission characteristics to insure that all channels are equal.

30. In citing "poor reception" on certain cable channels, the public broadcasters apparently refer to the possibility of interference from other transmission sources. In rare cases, limited site-specific conditions may affect the picture quality of a specific cable channel as received by a specific subscriber. Direct pickup interference experienced by an individual television household could be caused by a physically adjacent two-way radio transmitter, which may affect one cable channel if that cable channel is received without a converter, on a cable ready TV set. There may also be rare site-specific cases of direct pickup interference from a physically adjacent VHF television transmitter on the single channel of operation of the television transmitter if that same VHF channel is received by cable without a converter. In my experience,[10] almost every case of direct

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[10] Report: *Study of the Potential Impact of Direct Pickup Interference*, performed by Stern Telecommunications Corporation for Cable Television Laboratories (CableLabs), October 30, 1992.

pickup interference can be eliminated by the use of a converter for the selection of cable channels.

June 16, 1995

/s/ Joseph Stern
JOSEPH STERN

[Jurat Omitted]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

MEMORANDUM OF TURNER PLAINTIFFS IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

June 16, 1995

* * * *

[Appendix A]

BROADCAST STATIONS REFERRED TO IN THE GOVERNMENT'S MEMORANDUM AND DEFENDANTS' FACT AFFIDAVITS

Station Name	Off-air channel position	Total # stations in market	Designated Market Area (DMA)	DMA Ranking
WLIG	55	23	New York, NY	1
KSTV	57	24	Los Angeles	2
KDOC	56	24	Los Angeles	2
WGTW	48	20	Philadelphia, PA	4
WTGI	61	20	Philadelphia, PA	4
KPST	66	22	San Francisco-Oakland-San Jose, CA	5
KCSM Public	60	22	San Francisco-Oakland-San Jose, CA	5
KCNS	38	22	San Francisco-Oakland-San Jose, CA	5
KICU	36	22	San Francisco-Oakland-San Jose, CA	5
KBHK	44	22	San Francisco-Oakland-San Jose, CA	5
WGOT	60	19	Boston, MA	6
WHRC	46	19*	Boston, MA	6
WTMW	14	17	Washington, D.C.	7
WTLK	14	13	Atlanta, GA	10
WHSG	63	13	Atlanta, GA	10
KTFH	49	16	Houston, TX	11
KNWS	51	16	Houston, TX	11
WOAC	67	14	Cleveland, OH	13
WTMV	32	15	Tampa-St. Petersburg-Sarasota, FL	15
WPGH Fox	53	10	Pittsburgh, PA	17
KCEC	50	18	Denver, CO	18
KWHD	53	18	Denver, CO	18
WAYK-now WIRB	56	13	Orlando-Daytona Beach-Melbourne, FL	22
WCEU Public	15	13	Orlando-Daytona Beach-Melbourne, FL	22
WHMB	40	14	Indianapolis, IN	24
KPTV	12	10	Portland, OR	25

Station Name	Off-air channel position	Total # stations in market	Designated Market Area (DMA)	DMA Ranking
WHCT	18	10*	Hartford-New Haven, CT	26
WHKE	55	12	Milwaukee, WI	29
KMCI	38	10	Kansas City, MO	31
WYED	17	11	Raleigh-Durham, NC	32
WJFB	66	11*	Nashville, TN	33
WSFJ	51	7	Columbus, OH	34
WTJA	26	8*	Buffalo, NY	36
KOOG	30	12	Salt Lake City, UT	37
WGNT	27	7	Norfolk-Portsmouth-Newport News, VA	40
WCCL	49	9	New Orleans, LA	41
WPTY Fox	24	9	Memphis, TN	42
WCVX	58	6*	Providence, RI	46
WAAP (formerly WRDG)	16	9	Greensboro-High Point-Winston Salem, NC	48

1928

WVAH Fox	11	11	Charleston-Huntington, WV	56
WUXA Public	30	11*	Charleston-Huntington, WV	56
KWHB	47	12	Tulsa, OK	59
KRSC Public	35	12	Tulsa, OK	59
KWHE	14	10	Honolulu, HI	69
WSCO	14	7*	Green Bay-Appleton, WI	70
KSKN	22	9*	Spokane, WA	75
KIIN Public	12	8	Cedar Rapids-Waterloo-Dubuque, IA	84
WNPL	46	7	Fort Myers-Naples, FL	89
WFAT	19	7*	Johnstown-Altoona, PA	91
WINM	63	6	Fort Wayne, IN	104
KADY	63	5	Santa Barbara-Santa Maria-San Luis Obispo, CA	112
		[24]	[Note: KADY also claims harm in the L.A. market]	[2]

1929

Station Name	Off-air channel position	Total # stations in market	Designated Market Area (DMA)	DMA Ranking
KDRV ABC	12	8	Medford-Klamath Falls, OR	145

• Indicates station not included in total number of stations in market

SOURCE: *Broadcasting & Cable Yearbook*, 1995

FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' SUPPLEMENTAL APPENDIX IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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* * * *

Dated: June 16, 1995

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SUPPLEMENTAL APPENDIX

Part A: Analysis of Plaintiff Programmers' Claims on Time Warner Systems

The attached analysis examines the claims made by plaintiff programmers that involve Time Warner systems.[1] Because Time Warner is the only cable operator that is a party to this case, there is relatively more information concerning the decisions made by that operator than there is about other cable operators. Thus, although one can never know why a cable operator actually makes the decisions that it does, as plaintiffs have noted, *see* DAE VI.B, Holloway Dep. at 136-38, there is at least more information available about the programming being carriet on Time Warner's systems. Because plaintiffs have emphasized that Time Warner is typical of other cable systems. an examination of plaintiffs' claims on Time Warner systems should provide a useful test for plaintiffs' claims as a whole.

In many cases, the plaintiff programmers did not even allege that must carry was the cause of their claimed injuries. The vast majority of the claims raised by plaintiff programmers involve failure of cable systems to launch the programmer in question; with respect to these allegations, however, in most cases the plaintiffs failed to allege that the system had added any must carry stations and did not even allege that the systems in question had any interest in adding their programming networks. With respect to plaintiffs' very few claims of channel repositioning, neither they nor Time Warner allege that any broad-

[1] On April 14, 1995, plaintiff programmers submitted a final version of their claims concerning specific injuries on particular cable systems. These allegations, which involve both Time Warner systems and other cable operators, can be found at DAE VOLS. VII.A and VII.B, EXHS. 34-35. The number of Time Warner cable systems used for this analysis was taken from Time Warner's interrogatory responses.

casters added on the systems in question actually asserted a right under the 1992 Cable Act to the channels on which they were placed. Indeed, an examination of these these repositioning claims demonstrates that the vast majority of these realignments involve decisions made by the particular cable system to realign its cable programming, independent of must carry.

In most cases, Time Warner itself has not specifically alleged that must carry has prevented it from failing to add the particular programmer that claims such injury; Time Warner has nominally adopted the claims of the plaintiff programmers, but its own claims of injury often contradict those of the other plaintiffs. Moreover, in many cases where plaintiffs allege a failure to launch, Time Warner's own channel line-ups show that the system is carrying the programming in question.

The results of this analysis show that, in almost every case where a plaintiff programmer has alleged injury on a particular Time Warner system, the system in question has either 1) added *no* must carry stations, 2) added numerous other cable programmers, thus demonstrating that the system simply chose other programming options over the programmer alleging injury, or 3) indicated that it intends to add up to 80 channels of new capacity within the next four years.

An examination of plaintiffs' claims on these systems thus demonstrates that plaintiff programmers' claims simply do not stand up to scrutiny. There is no basis to conclude that plaintiffs' claims of injury on systems owned by other MSO's would fare any better.

PROGRAMMERS' ALLEGATIONS CONCERNING TIME WARNER SYSTEMS

HIGHLIGHTS

—A&E's only claim—a repositioning claim—is not supported by Time Warner's documents, and the system involved added *no* must carry stations.

—BET claims failure to launch on 8 Time Warner systems, but documents produced by Time Warner show that BET is being carried on 3 of these systems. The documents also show that with respect to the remaining 5 systems, each system has either added *no* must carry stations, or has added at least 3 other cable programmers since June of 1993.

—Of CHC's 2 failure to launch claims, neither of which is supported by any documentary evidence, 1 of the 2 systems involved has added *no* must carry stations. Both systems will be adding more than 25 channels to their capacity within the next 4 years.

—Of the Cartoon Network's 12 claims of injury, one is on a system that is carrying the Cartoon Network full-time. Of the remaining 11 systems, 4 have added *no* must carry stations, there is no evidence that the other 2 had any interest in adding the Cartoon Network, and 9 will be adding between 18 and 77 channels within the next 4 years.

—The documents cited in support of CNN's only 2 claims of injury—both of which are claims of possible repositioning in the future—state on their face that the programming decisions of operators, and not must carry, are the cause of the claimed injury.

—The only injury claimed by CNN International is that 7 Time Warner systems failed to launch the program, despite the fact that it only went on the air in January, 1995. All of these systems will be adding 18 or more channels within the next four years.

—C-Span alleges *no* current, unresolved injury in any Time Warner system.

—C-Span II alleges only 2 current deductions of carriage on Time Warner systems. The programmer admits one of these reductions is unrelated to must carry, and the other is on a system which has added 10 other cable programming services within the last year and a half.

—Of E!'s allegations that Time Warner systems failed to launch or expand their carriage of E!, 2 are on systems that have already launched E!, and 7 involve systems that have not added any must carry stations at all. Of the remaining 6 aillegations, all are on systems that either have open available channels, have indicated that the channels taken up by new must carry stations would have been used for programming other than E!, or have added at least three other cable programming services since June of 1993.

—Headline News has alleged that Time Warner failed to launch its program in two systems and repositioned HLN in another. Time Warner's interrogatory responses and documents show that HLN is being carried on one of these systems, that one system chose to carry other new cable programming rather than Headline News, and that the other system repositioned HLN in order to move CNBC, another cable programmer, down the dial.

—Lifetime has alleged injury on *none* of Time Warner's 291 systems.

—QVC has alleged injury on only 1 Time Warner system, and that system has already returned QVC to carriage on portions of the system that have been upgraded and is proceeding with an upgrade of the remainder of the proceeding with an upgrade of the remainder of the system.

—Q2 alleges that it was dropped from only 2 Time Warner systems. Both of these systems added Valuevision, another home shopping cable programmer, rather than keeping Q2 on the air.

—Of the 6 Time Warner systems on which the Sci-Fi Channel has alleged failure to launch or delayed launches, 4 are carrying the Sci-Fi Channel today. One of the remaining 2 systems has added *no* must carry stations and *18* other cable programmers since June of 1993. As for the other system, Time Warner indicated that it had

planned to use the two channels taken up by new must carries for programs other than the Sci-Fi channel.

—WTBS Superstation alleges that it was repositioned on only 6 Time Warner systems, and on none of these systems does WTBS claim that a broadcaster's assertion of channel position rights under the Cable Act caused the cable system to reposition or retier WTBS.

—Of the eight systems on which Turner Classic Movies claims that Time Warner failed to launch that network, two have added *no* must carry stations, two have added 8 or more other cable programmers since June of 1993, and the other 4 will be adding between 18 and 77 new channels within the next four years.

—The Family Channel has alleged injury on *none* of Time Warner's 291 systems.

—The Game Channel's only allegation of harm is that one Time Warner system failed to launch the program. This system has added *no* must carry stations since June of 1992 and has added five other cable programmers since that time.

—The History Channel alleges that it failed to be launched on only 5 Time Warner systems—one of which *is* carrying the History Channel, one of which added *no* must carries, and one of which has available capacity but has elected not to use it for the History Channel. The remaining two systems have added several other cable programmers in the last 2 years or plan to add 30 or more channels within the next four years.

—The only injury alleged by TNT is repositioning in two Time Warner systems. In neither system does TNT allege that the must carry station asserted channel position rights under the Cable Act.

—Time Warner does not itself state that must carry caused it to drop the Travel Channel in the only 2 systems in which the Travel Channel alleges drops. With

respect to the 7 other systems in which the Travel Channel claims that Time Warner failed to add (or increase carriage of) the Travel Channel, 3 systems added *no* must carry stations, and 2 are actually carrying the Travel Channel full-time today.

—The USA Network claims that it was moved to a higher tier in three Time Warner systems, but in all three instances USA stayed on the same channel position, and there is no allegations that must carry required that cable system to move USA to a higher tier.

—HBO and Cinemax has alleged injury on *none* of Time Warner's 291 systems.

—Court TV has only alleged injury on 3 Time Warner systems, all of which chose to add between 2 and 8 other cable programmers since June of 1993 rather than add Court TV.

—The Discovery Channel has alleged injury on *none* of Time Warner's 291 systems.

—Of the Learning Channel's 3 claims of injury, one is on a system that is carrying the Learning Channel. The other two involve systems that have added at least 4 other cable programmers in the last year and a half, and which plan to increase their channel capacity substantially within the next four years.

1. *Arts & Entertaianment (A&E)*

Arts & Entertainment (A&E) has not alleged any injury on 290 of Time Warner's 291 cable systems. (Allegations related to A&E's other programming network, The History Channel, are discussed below.) *See* DAE VOL. VII.A, EXH. 35, at 3 (listing A&E's claim of injury on the Lynchburg, Virginia system).

This single allegation is based on an internal A&E memo noting that A&E was repositioned from Channel 21 to Channel 26 in Lynchburg, Virginia. The memo-

randum provides no explanation for this repositioning, nor does it state that the change is related to the must carry requirements.

Time Warner did not itself claim that it was injured by being forced to move A&E on this system. Time Warner's interrogatory responses indicate that the Lynchburg system has *not* added any must carry station (ie., the only stations being carried pursuant to the must carry provisions were already being carried by Time Warner when the Act's requirements became effective). DAE VOL. VII.B, EXH. 57, at 1). Thus, there is no basis for A&E to attribute this alleged repositioning to the must carry requirements. Indeed, according to documents produced by Time Warner, this system has placed CNN on channel 21, rather than A&E. *See* DAE VOL. VII.T, EXH. 485, at TWS00232990-992.

Notably, this system has also added 15 cable programmers to its programming since June 2, 1993. (DAE VOL. VII.T, EXH. 485, at TWS00232989). Time Warner's responses also indicate that this system recently increased its channel capacity by 43 channels. (DAE VOL. VII.B, EXH. 57, at 4).

2. *BET*

Black Entertainment Television has not alleged any injury on 283 of Time Warner's 291 cable systems. *See* DAE VOL. VII.A, EXH. 36. BET's allegations relating to eigfiht remaining Time Warner systems are as follows:

A. *Archdale, NC.* BET alleges that this system is unable to add BET because it has no channel capacity. (DAE VOL. VII.A., EXH. 36, at 7). The documents cited by BET to support this claim do not attribute BET's failure to be carried on this system to must carry.

   Time Warner's interrogatory responses indicate that three of this system's 36 activated channels are being

used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added three other cable programming network. (DAE VOL. V..B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B, EXH. 57, at 5).

B. *Asheboro, NC.* BET alleges that this system is unable to add BET because it has no channel capacity. (DAE VOL. VII.A, EXH, 36, at 7). The documents cited by BET to support this claim do not attribute the failure to be carried on this system to must carry.

Moreover, documents produced by Time Warner show that this system has been carrying BET since at least June of 1993. (DAE VOL. VII.O, EXH. 377, at TWS00232292). Time Warner's interrogatory responses indicate that three of this system's 38 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 53.

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B, EXH. 57, at 5).

C. *Hernando and West Hernando, FL* (assumed to be Warner's Citrus County, FL, system). BET alleges that this system failed to launch BET due to lack of channel capacity. (DAE VOL. VII.A, EXH 36, at 3-5). The documents cited by BET to support this claim do not attribute the failure to be carried on this system to must carry.

Time Warner's interrogatory responses indicate that this system has added only one must carry station

since the Act became effective. Since June 2, 1993, the system has, however, added 9 other cable programmers, and has increased its channel capacity by 5 channel (DAE VOL. VII.B., EXH. 53, at 13).

D. *Johnstown, PA*. BET alleges that this system failed to add BET because it had no channel capacity. (DAE VOL. VII.A, EXH. 36, at 10).

Time Warner's interrogatory responses, however, indicate that this system has added *no* must carry stations since June of 1993. (DAE VOL. VII.B, EXH. 53).

E. *Lebanon, PA*. BET alleges that this system failed to lauch BET due to lack of channel capacity. (DAE VOL. VII.A, EXH. 36, at 11). The document cited by BET to support this claim does not attribute the failure to be carried on this system to must carry. Time Warner's interrogatory responses indicate that this system had added only one must carry station since the Act became effective. Since June 2, 1993, the system has, however, added 3 other cable programmers (DAE VOL. VII.B., EXH. 53, at 27).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78 analog channels within the next four years. (DAE VOL. VII.T, EXH. 484).

F. *Monroeville, PA*. BET alleges that this system failed to increase BET from part-time to full-time. (DAE VOL. VII.A, EXH. 36, at 11). The document cited by BET to support this claim does not attribute the failure to be carried on this system to must carry. Indeed, that document indicates that the operator chose to carry off-track racing for 4 hours per week on the same channel as BET in order to provide more variety for his subscribers. (DAE VOL. VII.O, EXH. 378. at B0000166).

Time Warner's ointerrogatory responses indicate that this system has added *no* must carry stations since the Act became effective. (DAE VOL. VII.T, EXH 486, at TWS00232712).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78 analog channels within the next four years. (DAE VOL. VII.T, EXH. 484.

G. *Orlando, FL*. BET alleges that this system failed to launch BET due to lack of channel capacity. (DAE VOL. VII.A, EXH. 36, at 5).

Documents produced by Time Warner, however, show that BET has been carried on this system since at least November of 1988, and continues to be carried. (DAE VOL. VII.O, EXH. 375, at TWS00232221).

H. *Polk, FL*. BET alleges that this system failed to launch BET due to lack of channel capactiy. (DAE VOL. VII.A, EXH. 36, at 5).

Documents produced by Time Warner, however, show that BET is currently being carried on this system, and has been carried on this sytsem since at least June of 1993.

3. *Cable Health Club (CHC)*

Cable Health Club has not alleged any injury on 289 of Time Warner's 291 cable systems. *See* VOL. VII.A., EXH. 39, at 1, 7 (listing CHC's claims of injury). CHC's allegations relating to the two remaining Time Warner systems are as follows:

A. *Orange, CA (listed as ATC system)*. CHC alleges that this system is unable to add CHC because it has no capacity. (DAE VOL. VII.A., EXH. 39, at 1). This allegation is based on what they were told by the cable system. The document does not indicate

that this was caused by must carry, or that the system had any interest in carrying CHC.

Time Warner's interrogatory responses indicate that four of this system's 52 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VIIB., EXH. 54,at 1). Although Warner claims that it has added only 4 programming services since June 2, 1993, the system has added 5 channels to its capacity, and claims that it has reduced or dropped other programming because of must carry. (DAE VOL. VII.B, EXH. 54, at 1). According to this information, there must be open available channels on the system. Documents produced by Time Warner indicate that this system has added Valuevision, a home shopping cable programmer to fill at least one of these channels. (DAE VOL. VII.T, EXH. 487, at TWS-000232850) (channel 48).

Moreover, CHC will also have numerous opportunities to obtain carriage on this system in the future. Time Warner's responses indicate that this system plans to increase its channel capacity by 28 channels within the next four years. (DAE VOL. VII.B., EXH. 57, at 3).

B. *San Diego, CA.* CHC alleges that this system is unable to add CHC because it has no capacity. (DAE VOL. VII.A., EXH. 39, at 7). This allegation is based on what they were told by the cable system. The document cited by CHC does not indicate that this was caused by must carry, or that the system had any interest in carrying CHC.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. Since June 2, 1993, the system has added five cable programmers. (DAE VOL. VII.B., EXH. 53, at 19).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 26 channels within the next four years. (DAE VOL. VII.B., EXH. 56, at 6).

4. *Cartoon Network (CN)*

The Cartoon Network (CN) has not alleged any injury on 279 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 42 (listing CN's claims of injury). CN's allegations relating to the twelve remaining Time Warner systems are as follows:

A. *Archdale, NC.* CN alleges that this system is unable to add CN because it has no capacity and a rebuild of the system will not be completed "for some time." (DAE VOL. VII.B., EXH. 42 at 21). CN did not provide any documents supporting its allegation or indicating that this Time Warner system had any interest in carrying CN. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that three of this system's 36 activated channels are being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added three other cable programming networks. (DAE VOL. VII.B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B, EXH. 57, at 5).

B. *Asheboro, NC.* CN alleges that this system is unable to add CN because it has no capacity and a rebuild of the system will not be completed "for some time." (DAE VOL. VII.B., EXH. 42, at 21). CN did not provide any documents supporting its allegation or indicating that this Time Warner sytem had any

interest in carrying CN. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that three of this system's 38 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VIIB, EXH. 57, at 5).

C. *Columbus, OH.* CN alleges that this system placed CN on "a la carte." CN does not alleged that the system's decision was related to must carry, nor does it provide any documents supporting its claim or indicating that this Time Warner system had any interest in carrying CN on a basic tier. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that two of this system's activated channels[1] are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 56, at 1).

D. *Eau Claire, WI.* CN alleges that this system is unable to add CN because it has no capacity. (DAE VOL. VII.B., EXH. 42, at 21). This is apparently based on what the system told them. The document does not indicate that this was caused by must carry.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act became effective. Since June 2, 1993, the

[1] The Eastern District of the Columbus, OH system has 34 activated channels; the Western District has 77 activated channels.

system has, however, added *17 other cable programming networks.* (DAE VOL. VII.B., EXH. 57, at 2). Thus, CN's claim of must carry injury on this system is baseless.

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 65 analog channels within the next four years. (DAE OL. VII.T, EXH. 484).

E. *Hampton, VA.* CN alleges that this system failed to add the Cartoon Network because of lack of channel capacity. DAE VOL. VII.B., EXH. 42, at 26. This allegation is based on what they were told by the cable system. The document upon which this allegation was based does not indicate that must carry is the cause of this system's lack of capacity.

Time Warner has indicated that this system has added *no* must carry stations since the Act's requirements became effective. (DAE VOL. VII.O, EXH. 369, at TWS00232983).

Time Warner's interrogatory responses also indicate that the system has plans to increase its channel capacity to 78 analog channels during the next four years. DAE VOL. VII.T, 7XH. 484).

F. *Milwaukee, WI.* CN alleges that this system failed to add the Cartoon Network due to a lack of channel capacity. (DAE VOL. VII.B., EXH. 42, at 26). This allegationisbased on what they were told by the cable system. This document cited in support of this allegation does not indicate that must carry is the cause of this lack of capacity.

Time Warner's interrogatory responses indicate that two of this system's 64 activated channels are being used by broadcast stations that were added since the Act became effective. Since that date, the system has also added two other cable programming net-

works, including Valuevision, a home shopping cable programmer. (DAE VOL. V..B, EXH. 43, at 14).

Time Warner's responses also indicate that this system plans to increase its channel capacity to 78-80 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

G. *Indianapolis, IN.* CN alleges that this system failed to launch the Cartoon Network and that the system had put launches on hold. (DAE VOL. VII.B., EXH. 42, at 1). This allegation is based on what they were told by the cable system. The document cited for this allegation does not mention must carry as the cause of launches being on hold.

Time Warner's interrogatory responses indicate that only two of the system's 42 activated channels are being used to carry a must carry station that was added since the Act became effective. (DAE VOL. VII.B, EXH. 53, at 18). Moreover, Time Warner has alleged that it was injured by being forced to drop the Color Weather Radar channel and by being unable to launch a pay-per-view channel. (DAE VOL. VII.B, EXH. 60, at 8-9). Thus, according to Time Warner, even absent must carry, there would not have been channel space on this system to launch the Cartoon Network.

H. *Canton, OH.* The Cartoon Network alleges that this system has failed to lauch it because of a lack of channel sapacity. (DAE VOL. VII.B., EXH. 42, at 25). This allegation is based on what they were told by the cable system.

Time Warner's interrogatory responses indicate that one of this system's 41 activated channels is being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added one other cable programming

network. (DAE VOL. VII.B., EXH. 53, at 11). Moreover, according to plaintiff Turner Broadcasting's own allegations, the addition of this single must carry was holding up the addition of Headline News, and not the Cartoon Network, on this system. (DAE VOL. VII.B., EXH. 42, at 25).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78-80 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

I. *Cincinnati, OH.* CN alleges that this system cannot launch CN until it completes its rebuild. (DAE VOL. VII.B., EXH. 42, at 26. This allegation is based on what they were told by the cable system. This document does not indicate that the system's decision not to add CN is based on must carry.

Time Warner's interrogatory responses indicate that one of this system's 60 activated channels is being used by a broadcast station that was added since the Act became effective. Since that time, this cable system has also added 5 other cable programming networkt. (DAE VOL. VII.O, EXH. 369, at TWA00232193).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 18 channels over the next four years. (DAE VOL. VII.B., EXH. 56, at 14).

J. *Youngstown, OH.* CN alleges that this system failed to launch CN due to lack of channel capacity. (DAE VOL. VII.B., EXH. 42, at 26). This is based on what it was told by the cable system, and the documents cited do not indicate that must carry was the cause.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since

June 3, 1993. Since that time, this cable system has added 3 other cable programming networks. (DAE VOL. VII.B, EXH. 53, at 11).

K. *Greensboro, NC.* CN alleges that this system has added 3 must carry stations and has failed to add CN due to lack of capacity. (DAE VOL. VII.B., EXH. 42, at 21). CN cites no documents for this claim.

Time Warner's interrogatory responses indicate that three of this system's 39 activated chanknels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 6).

Time Warner's responses also indicate that this system has plans to increase its chanel capacity to 70 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484). According to CN's allegation, this upgrade will be complete in July of 1995, giving the Cartoon Network the opportunity to compete for 30 open channels. (DAE VOL. VII.B., EXH. 42, at 21).

L. *Kansas City, MO.* CN alleges that this system was unable to add CN due to lack of capacity. (DAE VOL. VII.B., EXH.4 42, at 1). Neither CN's allegation nor the document cited make any reference to must carry.

Time Warner has indicated that this system has added *no* must carry stations since June of 1993. (DAE VOL. VII.O, EXH. 369, at TWS00232398).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78-80 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

5. *CNN*

CNN has not alleged any injury on 289 of Time Warner's 291 cable systems. *See* (DAE VOL. VII.B, EXH.

42) (listing CNN's claims of injury). CNN's allegations relating to the remaining two Time Warner systems are as follows:

A. *Orlando, FL.* CNN alleges that it "will probably" be moved to a higher channel. (DAE VOL. VII.B, EXH. 42, at 20). This allegation is based on what they were told by the cable system. This document states that the possible repositioning is due to the system's plans to include "an as yet unnamed service that seemingly will be distributed under the auspices of the Time/Warner Inc. name, perhaps a moive service." (DAE VOL. VII.T, at EXH. 488, at TB0008714. Thus, the document on its face states that must carry has nothing to do with CNN's claims.

Time Warner's interrogatory responses indicate that fice of this system's 53 articated channels are being used by broadcast stations that were addede since the Act became effective. Since that time, this cable system has also added ten other cable programming networks. (DAE VOL. VII.B., EXH. 53, at 12).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 77 analog video channels within the next four years. (DAE VOL. VII.T, EXH. 484).

B. *Manhattan, NY.* CNN alleges that it will be repositioned to a higher channel. (DAE VOL. VII.B, EXH. 42, at 21). This allegation is based on what they were told by the cable system. This document states that the repositioning occurred because the system chose to put CNBC in CNN's channel location. It does not indicate that the repositioning was related to must carry. (DAE VOL. VII.T, EXH. 489, at TB009173).

Time Warner's interrogatory responses indicate that two of this system's 77 activated channels are being

used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added five other cable programming networks. (DAE VOL. VII.B, EXH. 53, at 28).

6. *CNNI (CNN International)*

CNNI has not alleged any injury on 284 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B, EXH. 42 (listing CNNI's claims of injury). It must be remembered that CNNI was just launched in January of 1995, and thus has only been seeking launch commitments for a short time. CNNI's allegations relating to the remaining seven Time Warner systems are as follows:

A. *Shreveport, LA.* CNNI alleges that this systems has been unable to add CNNI because it has no channel capacity or plans to rebuild. (DAE VOL. VII.B., EXH. 42, at 21). The document cited by CNNI to support its claim states only that this system has been affected by must carry. There is no indication that the system declined to carry CNNI because of must carry, or that it had any interest in carrying CNNI. CNNI's itself, however, admits that this system has added 8 other cable programming networks since the passage of the Act. (DAE VOL. VII.B., EXH. 42, at 21).

Time Warner's interrogatory responses indicate that only one of the system's 40 activated channels is being used to carry a must carry station that was added since the Act became effective. (DAE VOL. VII.B, EXH. 53, at 4). Moreover, Time Warner itself claims that the addition of this must carry caused the system to drop C-Span and the Bravo Channel—not that the system was unable to launch CNNI. (DAE VOL. VII.B, EXH. 60, at 13).

Time Warner's interrogatory responses also indicate that the system has plans to increase its channel

capacity by 30 channels during the next four years. (DAE VOL. VII.B., EXH. 56, at 1).

B. *Archdale, NC.* CNNI alleges that this system is unable to add CNNI because it has no capacity and a rebuild of the system will not be completed "for some time." (DAE VOL. VII.B., EXH. 42, at 21). CNNI did not provide any documents supporting its allegation or indicating that this Time Warner system had any interest in carrying CNNI. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that three of this ssytem's 36 activated channels are being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added three other cable programming networks. (DAE VOL. VII.B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VIIB, EXH. 57, at 5).

C. *Asheboro, NC.* CNNI alleges that this system is unable to add CNNI because it has no capacity and a rebuild of the system will not be completed "for some time." (DAE VOL. VII.B., EXH. 42, at 21). CNNI did not provide any documents supporting its allegation or indicating that this Time Warner system had any interest in carrying CNNI. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that three of this system's 38 activated channels are being used by broadcast stations that were added since the Act because effective. (DAE VOL. VII.B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77

channels within the next four years. (DAE VOL. VIIB, EXH. 57, at 5).

D. *Hampton, VA.* CNNI alleges that this system failed to add the CNNI because of lack of channel capacity. (DAE VOL. VII.B, EXH. 42, at 26). This allegation is based on what they were told by the cable system. The document upon which this allegation was based does not indicate that must carry is the cause of this system's lack of capacity.

Time Warner has indicated that this system has added *no* must carry stations since the Act's requirements became effective. (DAE VOL. VII.O, EXH. 369, to TWS00232983).

Time Warner's interrogatory responses also indicate that the system has plans to increase its channel capacity to 78 analog channels during the next four years. (DAE VOL. VII.T, EXH. 484).

E. *Cincinnati, OH.* CNNI alleges that this system cannot launch CNNI until it completes its rebuild. (DAE VOL. VII.B, EXH. 42, at 26). This allegation is based on what they were told by the cable system. This document does not indicate that the ssytem's decision not to add CNNI is based on must carry.

Time Warner's interrogatory responses indicate that one of this system's 60 activated channels is being used by a broadcast station that was added since the Act became effective. Since that time, this cable system has also added 5 other cable programming networks. (DAE VOL. VII.O, EXH. 369, at TWS-00232193).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 18 channels over the next four years. (DAE VOL. VII.B., EXH. 56, at 14).

F. *Greensboro, NC.* CNNI alleges that this system has added 3 must carry stations and has failed to add CNNI due to lack of capacity. (DAE VOL. VII.B, EXH. 42, at 21). CNNI cites no documents for this claim.

Time Warner's interrogatory responses indicate that three of this system's 39 activated channels are being used by a broadcast station that was added since the Act because effective. (DAE VOL. VII.B., EXH. 53, at 6).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 70 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484). According to CNN I's allegation, this upgrad will be complete in July of 1995, giving the opportunity to compete for over 30 open channels. (DAE VOL. VII.B., EXH. 32, at 21).

I. *Memphis, TN.* CNNI alleges that this system was unable to add CNNI. (DAE VOL. VII.B, EXH. 42, at 21). CNNI makes no reference to must carry in its allegation and has icted to no document to support its claim.

Time Warner's interrogatory responses indicate that only 2 of this system's 39 channels are being used to carry must carry stations added after June of 1993. (DAE VOL. VII.B, EXH. 53, at 34). Moreover, this system has added 2 pay-per-view channels since that date and has increased its capacity by 3 channels since June of 1993. *Id.*

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

7. *C-SPAN.*

C-SPAN does not allege ongoing injury on *any* of Time Warner's 291 cable systems. C-SPAN had its carriage temporarily reduced on Time Warner's Columbus system. C-SPAN's allegations state that this reduction aws "resolved" to C-Span's satisfaction.

8. *C-SPAN II.*

C-SPAN II has not alleged any ongoing injury on 289 of Time Warner's 291 cable systems. *See* DAE VOL. VII.A., EXH. 37 (listing C-SPAN II's claims of injury). Four other "carriage problems" on Time Warner systems have been resolved. C-SPAN II's allegations relating to these six Time Warner systems are as follows:

A. *Albany, NY.* C-SPAN II alleges that this system reduced its carriage of C-SPAN II to accommodate a must carry station. (DAE VOL. VII.A., EXH. 37).

Time Warner has indicated that 2 of this system's 40 activated channels are being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added 10 other cable programming networks. (DAE VOL. VII.B, EXH. 56, at 1). Indeed, this system has elected to carry three channels of HBO and two channels of Cinemax, both of which are Time Warner-owned programmers, rather than to carry C-Span II full-time. *Id.* Moreover, Time Warner has admitted that the Albany system has added 30 channels to its capacity since June of 1993; given that the system has only added two must carry broadcast stations and has added 10 other cable programmnig services, there must be unsued channel capacity on the system. (DAE VOL. VII.B, EXH. 56, at 1).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 35

channels within the next four years. (DAE VOL. VII.B., EXH. 57).

B. *Austin, TX.* C-SPAN II alleges that this system reduced its carriage of C-SPAN II. (DAE VOL. VII.A., EXH. 37). C-SPAN II's allegations, however, admit that the system decreased C-SPAN II coverage for reasons other than must carry or retransmission consent. (DAE VOL. VII.A., EXH. 37). Indeed, according to plaintiff's documents, C-SPAN II "was dropped to add revenue generating channels." *Id.*

Time Warner itself does not allege that must carry caused this system to reduce its carriage of C-SPAN II. Time Warner's interrogatory responses indicate that only one of this system's 57 activated channels is being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added 6 other cable programming networks. (DAE VOL. VII.B, EXH. 53, at 37).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 21 channels within the next four years. (DAE VOL. VII.B., EXH. 56, at 10).

C. *Brooklyn/Queens, NY.* C-SPAN II alleges that this system reduced its carriage of C-SPAN II, but does not specifically claim that must carry was the cause of the reduction in carriage. According to C-SPAN II, however, this carriage problem has been "resolved." (DAE VOL. VII.A., EXH. 37).

Time Warner does not itself allege that C-SPAN II had to be reduced on this system because of must carry. Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. Since that time, this cable system has added 4 other

cable programming networks. (DAE VOL. VII.B., EXH. 53, at 28).

D. *Shreveport, LA.* C-SPAN II alleges that this system dropped C-SPAN II, but does not specifically claim that must carry was the cause of the drop. According to C-SPAN II, however, this carriage problem has been "resolved." (DAE VOL. VII.A., EXH. 37).

Time Warner's interrogatory responses indicate that the system has added 9 channels to its capacity since June of 1993, but claims to have added only one broadcast stations since that time (and to have reduced the hours of carriage of C-SPAN II and Bravo). (DAE VOL. VII.B, EXH. 53, at 4). This system thus appears to have available channel capacity to carry C-SPAN II.

E. *St. Petersburg, FL (Paragon Tampa Bay).* C-SPAN II alleges that this system reduced its carriage of C-SPAN II. (DAE VOL. VII.A., EXH. 37), but does not specifically allege that must carry was the cause of any reduction of carriage. Moreover, C-SPAN II admits that this carriage problem has been "resolved" to its satisfaction. (DAE VOL. VII.A., EXH. 37).

Time Warner itself does not allege that it reduced C-SPAN II's carriage because of the must carry requirements. Time Warner's interrogatory responses indicate that only one of this system's 60 activated channels is being used to carry a must carry station that was added since the Act became effective. Moreover, this system has increased its channel capacity by 4 channels since June of 1993, indicating that the system has channels not in use. (DAE VOL. VII.B, EXH. 54, at 2).

Time Warner's responses also indicate that the system has plans to increase its channel capacity to 78

analog channels during the next four years. (DAE VOL. VII.T, EXH. 484).

F. *Westerville, OH.* C-SPAN II claims that Time Warner's Westerville, OH system reduced its carriage, but that this carriage problem was "resolved."

9. *E!.*

E!, a cable programmer in which Time Warner has an equity stake, has not alleged any injury on 276 of Time Warner's 291 cable systems. *See* DAE VOL. VII.A., EXH. 38 (listing E!'s claims of injury). E!'s allegations relating to the 15 remaining Time Warner systems are as follows:

A. *Bakersfield, CA.* E! alleges that this system has been unable to expand E! from part-time to full-time carriage because it has insufficient channel capacity. (DAE VOL. VII.A, EXH. 38, TBL. 3, at 7). This allegation is based on what they were told by the cable system. This document cited by E! does not indicate that this constraint was related to must carry.

Time Warner has indicated that, as of the time of the deposition of Time Warner's designee, this system has one open, unused channel and has provided no reason why this system could not carry E! full-time. (DAE VOL. VII.O, EXH 369, at TWS-00232078). According to Time Warner's interrogatory responses, only one of the system's 61 activated channels is being used to carry a must carry station that was added since the Act became effective and the system has added 6 new channels to its capacity since that time. (DAE VOL. VII,B, EXH. 53, at 8). Time Warner's interrogatory responses also indicate that this system has also added 8 other cable programming networks since that date. (DAE VOL. VII,B, EXH. 53, at 8). Moreover, Time

Warner itself has alleged that it wanted to add Court TV on the channel on which the must carry was placed. (DAE VOL. VII.B, EXH. 60, at 2). Thus, must carry has nothing to do with the system's decision to carry E! part-time only.

B. *Palm Springs, CA*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, EXH. 38, TBL 3, at 7). This allegation is based on what they were told by the cable system. This document cited does not indicate that this constraint is related to must carry.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. The responses also indicate that this system has added 7 other cable programming networks since that date. (DAE VOL. VII.B, EXH. 53, at 19).

Time Warner's interrogatory responses also indicate thata the system is seeking to increase its channel capacity to 77 channels within the next four years. (DAE VOL. VII.T, EXH. 484).

C. *Lake City, FL*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. This document cited does not indicate that this constraint is related to must carry.

Time Warner has indicated that this system has added *no* must carry stations since the Act's requirements became effective. This system has added 1 other cable programming network since that date. (DAE VOL. VII.O, EXH 369, at TWS00232868).

D. *Cape Canaveral, FL* (assumed to be Time Warner's Melbourne, FL, system). E! alleges that this system has been unable to expand E! from part-time to full-

time carriage because it has insufficient channel capacity and must-carry obligations. (DAE VOL. VII.A, EXH. 38, TBL. 2, at 9). This allegation is based on what they were told by the cable system. Time Warner's interrogatory responses indicate that only two of the system's 42 activated channels are being used to carry must carry stations that were added since the Act became effective. The responses also indicate that this system has added 3 other cable programming networks since that date. (DAE VOL. VIIB, EXH. 53, at 12).

Time Warner's interrogatory responses indicate that the system has plans to increase its channel capacity by 35 channels during the next four years. (DAE VOL. VOL.B, EXH. 56. at 4).

E. *Indianapolis, IN*. E! alleges that this system has not added E! because of a lack of channel capacity, and that E! might have been launched if the system had not been carrying two must-carry stations. (DAE VOL. VII,A, EXH. 38, TBL. 2, at 9). This allegation is based on what they were told by the cable system.

Time Warner's interrogatory responses indicate that only two of the system's 42 activated channels are being used to carry a must carry station that was added since the Act became effective. (DAE VOL. VII.B, EXH. 53, at 18). Moreover, Time Warner has alleged that it yas injured by being forced to drop the Color Weather Radar channel and by being unable to launch a pay-per-view channel. (DAE VOL. VII,B, EXH. 60, at 8-9). Thus, according to Time Warner, even absent must carry, E! would not have been launched on the system.

F. *Madisonville, KY*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, EXH. 38, TBL. 3, at 8). This

allegation is based on what they were told by the cable system. The document cited does not indicate this this constraint is related to must carry.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. DAE VOL. VII.B, EXH. 53, at 2).

G. *Medford, MA*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, EXH. 38, TBL. 2, at 9). This allegation is based on what they were told by the cable system. The document cited states only that E! "may have launch opportunities" with this cable system if must-carry is overturned.

Time Warner's interrogatory responses indicate that this system has added four must carry stations since the Act's requirements became effective. The responses also indicate that this system has added 8 other cable programming network since that date, including a second channel of Cinemax, a second channel of Showtime, and 2 additional HBO channels. (DAE VOL. VII.O, EXH. 369, at TWS-00232113).

H. *Akron, OH*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, TBL. 3, EXH. 38, at 8). Time Warner's interrogatory responses, however, indicate that E! has been added to this system. (DAE VOL. VII.B, EXH. 53, at 10).

I. *Lima, OH*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. The document cited does not indicate that the system declined to carry E! because of must carry.

Time Warner has inudicated that this system has added *no* must carry stations since the Act's requirements became effective. (DAE VOL. VII.O, at EXH. 369, at TWS00232581).

J. *Ottawa, OH*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A, EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. The document cited does not indicate that the system declined to carry E! because of must carry.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. The responses also indicate that this system has added 1 other cable programming network since that date. (DAE, VOL. VII.B, EXH. 53, at 45).

K. *Waponetka, OH*. E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A., EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. The cited document does not indicate that the system declined to carry E! because of must carry.

Time Warner's most recent channel line-up for this system shows that the system is carrying E! on channel 23. (DAE VOL. VII.T., EXH. 490, at TWS-00232658.) Moreover, Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. The responses also indicate that this system has added 1 other cable programming network since that date. (DAE VOL. VII.B., EXH. 53 at 48).

L. *ATC, Reading, PA* (assumed to be Time Warner's Berks, PA, system). E! alleges that this system has

not expanded E! from part-time to full-time because of a lack of channel capacity. (DAE VOL. VII.A., EXH. 38, TBL. 3, at 1). This allegation is based on what they were told by the cable system.

Time Warner has indicated that this system has added *no* must carry stations since June of 1993. (DAE VOL. VII.T., EXH. 491, at TWS00232662-63.) The responses also indicate that this system has added 1 other cable programming network since that date. (DAE VOL. VII.T., EXH. 491 at TWS00232661).

M. *Hampton, VA.* E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A., EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. The document cited does not indicate that the system declined to carry E! because of must carry.

Time Warner has indicated that this system has added *no* must carry stations since the Act's requirements became effective. (DAE VOL. VII.O, EXH. 369, at TWS00232983).

Time Warner's interrogatory responses also indicate that the system has plans to increase its channel capacity to 78 analog channels during the next four years. (DAE VOL. VII.T., EXH. 484).

N. *Appleton, WI.* E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A., EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. The documents cited do not indicate that this constraint is related to must carry.

Time Warner's interrogatory responses indicate that only one of the system's 46 activated channels is being used to carry a must carry station that was

added since the Act became effective. The responses also indicate that this system has added four other new cable programming networks since that date. (DAE VOL. VII.B., EXH. 53, at 22).

O. *Green Bay, WI.* E! alleges that this system has not added E! because of a lack of channel capacity. (DAE VOL. VII.A., EXH. 38, TBL. 3, at 8). This allegation is based on what they were told by the cable system. The documents cited do not indicate that this constraint is related to must carry.

Time Warner's interrogatory responses indicate that only one of the system's 46 activated channels is being used to carry a must carry station that was added since the Act became effective. The responses also indicate that this system has added four other new cable programming networks since that date. (DAE VOL. VII.O., EXH. 369, at TWS00232239).

Time Warner's interrogatory responses also indicate that the system has proposed to increase its channel capacity to 70 channels within the next four year. (DAE VOL. VII.T., EXH. 484).

10. *Headline News (HLN)*

Headline News has not alelged injury on 288 of Time Warner's 291 cable systems. (DAE VOL. VII.B., EXH. 42) (listing Headline News' claims of injury). With respect to the remaining three Time Warner systems, Time Warner's allegations are as follows:

A. *Canton, OH.* HLN alleges that this system failed to launch HLN because of a lack of channel capacity. (DAE VOL. VII.B., EXH. 42, at 25). This allegation is based on what they were told by the cable system. The document cited does not indicate that this was caused by must carry, or that the system had any interest in carrying HLN.

Time Warner's interrogatory responses indicate that one of this system's 41 activated channels is being used by a broadcast staton that was added since the Act became effective. Since that time, this cable system has also added one other cable programming network. (DAE VOL. VII.B., EXH. 53, at 11).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78-80 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

B. *Cincinnati, OH*. HLN claims that this system moved HLN out of its standard service and repositioned HLN from channel 35 to 36. (DAE VOL. VII.B, EXH. 42 at 26). This allegation is based on what they were told by the cable system. The document cited does not indicate that the system's decision was based on must carry.

Time Warner has indicated that only one of the system's 60 activated channels is being used by a broadcast station thaat was added since the Act became effective. Since that time, this cable system has also added 5 other cable programming networks. (DAE VOL. VII.T, EXH. 492, at TWS00232193). In addition, documents produced by Time Warner show that this system realigned many cable programmers and repositioned CNBC down from channel 40 onto channel 35, thus causing the move of Headline News to channel 36. (DAE VOL. VII.T, EXH. 492, at TWS00232194-96). This was clearly not a result of must carry.

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 18 channels over the next four years. (DAE VOL. VII.B., EXH. 56, at 14).

C. *Youngstown, OH*. HLN alleges that this system failed to launch HLN due to lack of channel capac-

ity. (DAE VOL. VII.B, EXH. 42 at 26). This is based on it was told by the cable system, and the documents cited do not indicate that must carry was the cause.

Time Warner's documents show that this system *is carrying* HLN, and has been carrying HLN since at least June of 1993. (DAE VOL. VII.T, EXH. 493, at TWS00232533). Moreover, Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since June of 1993. Since that time, this cable system has added 3 other cable programming networks. (*Id.* at TWS-00232531).

11. *Lifetime*

Lifetime has not alleged injury on *any* of Time Warner's 291 cable system. *See* DAE VOL. VII.A., EXH. 40 (listing Lifetime's claims of injury).

12. *QVC*

QVC has not alleged any injury on 290 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 41 (listing QVC's claims of injury). QVC's allegations relating to the one remaining Time Warner system are as follows:

A. *Houston, TX*. QVC alleges that this system dropped QVC in order to make room for a system required by must carry. (DAE VOL. VII.B., EXH. 41, at 1, 4.) This allegati on is based on what they were told by the cable system. These documents indicate that the drop was causedby must carry, but that the system may retain QVC part-time and will return it to the system's channel lineup "as soon as possible."

Time Warner's interrogatory responses indicate that three of this system's 45 activated channels are being user by broadcast stations that were added since the

Act became effective. (DAE VOL. VIIB, EXH. 54, at 1). Moreover, the most recent channel line-ups for this system show that QVC is indeed available to subscribers in parts of this system that have been upgraded, including the City of Houston. (DAE VOL. VII.T, EXH. 494, at TWS00232327-31). Time Warner's responses also indicate that this system will be increasing its channel capacity by 34 channels over the next four years. (DAE VOL. VIIB., EXH. 57, at 5).

13. *Q2*

Q2 has not alleged any injury on 289 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 41 (listing Q2's claims of injury). Q2's allegations relating to the two remaining Time Warner's systems are as follows:

A. *Milwaukee, WI.* Q2 alleges that this system dropped Q2 in order to make room for a system required by must carry. (DAE VOL. VII.B., EXH. 41, at 3). This allegation is based on what they were told by the cable system.

Time Warner's interrogatory responses indicate that two of this system's 64 activated channels are being used by broadcast stations that were added since the Act became effective. Since that date, the system has also added two other cable programming networks, including Valuevision, a home shopping cable programmer. (DAE VOL. VII.B, EXH. 53, at 14).

Time Warner's responses also indicate that this system plans to increase its channel capacity to 78-80 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

B. *Greenfield, WI.* Q2 alleges that this system dropped Q2 in order to make room for a system required by must carry. (DAE VOL. VII.B., EXH. 41, at 3).

This allegation is based on what they were told by the cable system.

Time Warner's interrogatory responses indicate that two of this system's 110 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.T, EXH. 495, at TWS00232468). Moreover, the most recent channel lineup for this system indicates that only 104 of the system's 110 channels are currently being used for programming. (*Id.* at TWS00232470). Since June of 1993, the system has also added two other cable programming networks, including Valuevision, a home shopping cable programmer. (DAE VOL. VII.B, EXH. 53, at 15).

14. *Science Fiction Channel (SFC)*

Science Fiction Channel (SFC) has not alleged any in jury on 285 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 44. SFC's allegations relating to the six remaining Time Warner systems are as follows:

A. *Manhattan, NY (listed as New York, NY).* SFC alleges that this system delayed launching SFC "to meet obligations under 1992 Cable Act." (DAE VOL. VII.B., EXH. 44, at 11) SFC did not provide any documents supporting its allegations. *See* DAE VOL. VIIB., EXH. 44, at 11.

Time Warner, however, has launched the Sci-Fi channel on this system, as well as five other cable programming networks since June of 1993. (DAE VOL. VII.B, EXH. 53, at 28).

B. *Canton, OH.* SFC alleges that this system delayed launching SFC SFC until 5/95 because of a lack of channel capacity. (DAE VOL. VII.B., EXH. 44, at 11). This allegation is based on what they were told by the cable system. The document cited does not indicate that this was caused by must carry, or

that the system had any interest in carrying SFC. It appears that the Sci-Fi Channel has now been launched on this system.

Time Warner's interrogagtory responses indicate that one of this system's 41 activated channels is being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added one other cable programming networ. (DAE VOL. VII.B., EXH. 53, at 11).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78-80 analog channels over the next four years .(DAE VOL. VII.T, EXH. 484).

C. *Cincinnati, OH*. SFC alleges that this system failed to launch SFC until 4/95 because of a lack of channel capacity and "several must carries." (DAE VOL. VII.B., EXH. 44, at 11). This allegation is based on what they were told by the cable system. The documents cited does not indicate that the system's decision not to add SFC is based on must carry. It appears, nonetheless, that the system has launched the Sci-Fi Channel.

Time Warner's interrogatory responses indicate that one of this system's 60 activated channels is being used by a broadcast station that was added since the Act became effective. Since that time, this cable system has also added 5 other cable programming networks. (DAE VOL. VII.T, EXH. 492, at TWS00232193).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 18 channels over the next four years. (DAE VOL. VII.B., EXH. 56, at 14).

D. *Columbus, OH*. SFC alleges that this system delayed launching SFC until 4/95 because of capacity problems. (DAE VOL. VII.B., EXH. 44, at 11). This allegation is based on what the cable system told them. The document cited does not indicate that this was caused by must carry, or that the system had interest in carrying SFC. From SFC's allegation, it now appears that the Sci-Fi Channel is being carried on this system.

E. *Eau Claire, WI*. SFC alleges that this system did not add SFC because of a lack of channel capacity. (DAE VOL. VII.B., EXH. 44, at 12). This document cited does not indicated that this was caused by must carry, or that the system had any interest in carrying SFC.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act became effective. Since that date, the system has added 18 other cable programming networks. (DAE VOL. VII.B., EXH. 57, at 2).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 65 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

F. *Indianapolis, IN*. The Sci-Fi Channel claims that it was not launched on this system because the system lacked channel capacity. (DAE VOL. VII.B, EXH. 44, at 1). This allegation is based on what they were told by the cable system. The document cited by the Sci-Fi Channel does not refer to must carry.

Time Warner's interrogatory responses indicate that only two of the system's 42 activated channels are being used to carry a must carry station that was added since the Act became effective. (DAE VOL. VII.B, EXH. 43, at 18). Moreover, Time Warner has alleged that it was injured by being forced to drop the Color Weather Radar channel and by being

unable to launch a pay-per-view channel. (DAE VOL. VII.B, EXH. 60, at 8-9). Thus, according to Time Warner, even absent must carry, Sci-Fi Channel would not have been launched on the system.

15. *WTBS Superstation (TBS7*

WTBS Superstation (TBS) has not alleged any injury on 285 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 42 (listing TBS claims of injury). TBS's allegations relating to the six remaining Time Warner systems are as follows:

A. *Archdale, NC.* TBS alleges that this system repositioned TBS. (DAE VOL. VII.B., EXH 42, at 21) TBS did not provide any documents supporting its allegations or demonstrating that must carry was the cause of the claimed repositioning. *See* DAE VOL. VII.B, EXH. 42, at 21).

Neither Time Warner nor TBS have even alleged that any must carry added onto this system (or any broadcast station already being carried) asserted any channel position rights that caused TBS to be moved.

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B., EXH. 57, at 5).

B. *Asheboro, NC.* TBS alleges that this system repositioned TBS from channel 7 to channel 23. (DAE VOL. VII.B., EXH. 42, at 21). TBS did not provide any documents supporting its allegation. *See* DAE VOL. VII.B, EXH. 42, at 21.

Neither Time Warner nor TBS have even alleged that any must carry added onto this system (or any broadcast station already being carried) asserted any channel position rights that caused TBS to be moved.

There is thus no evidence that must carry, and not a decision made by the cable operator, caused TBS to be moved.

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B., EXH. 57, at 5).

C. *Columbus, OH.* TB Salleges that this system placed TBS on "a la carte." (DAE VOL. VII.B., EXH. 42, at 21). TBS does not allege that the system's decision was related to must carry, nor does it provide any documents supporting its claim or indicating that this Time Warner system had any interest in carrying TBS on a basic tier. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner does not itself allege that it was injured by being forced to carry TBS on an a la carte tier, nor does Time Warner explain how or if it is injured by placing a programmer on an a la carte tier. Time Warner's interrogatory responses indicate that two of this system's activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 56, at 1). Moreover, this system has added numerous new cable programmers, many of which were not placed on tiers. *See* DAE VOL. VII.T, EXH. 496, at TWS00232206.

D. *Akron, OH.* TBS alleges that it was placed on an a la carte tier on the Akron system. (DAE VOL. VII.B, EXH. 42, at 25). TBS, however, in no way alleges that the addition of must carry stations caused this system to place TBS on a tier.

Only one of this system's 66 channels is being used to carry a must carry station added after June of 1993. The system has added 28 cable programmers

since the passage of the Act and has restructured its line-up into several tiers. (DAE VOL. VII.O, EXH. 369, at TWS00232524).

E. *Cincinnati, OH.* TBS alleges that it was placed on a higher tier and moved from channel 17 to 18. (DAE VOL. VII.B, EXH. 42, at 26). This allegation is based on what they were told by the cable system. TBS does not specifically allege that must carry was the cause of this move, and the document cited by TBS does not refer to must carry.

Time Warner has indicated that one of this system's 60 activated channels is being used by a broadcast station that was added since the Act became effective. Since that time, this cable system has also added 5 VII.T, EXH. 492, at TWS00232193). There is no evidence that the move of TBS was caused by must carry. This system realigned its cable programming moved Nickelodeon down from channel 23 to channel 17, thus displacing TBS (*Id.* at TWS00232194).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 18 channels over the next four years. (DAE VOL. VII.B., EXH. 56, at 14).

F. *Greensboro, NC.* TBS alleges that this system repositioned TBS from channel 6 to channel 23 in order to add a must carry. (DAE VOL. VII.B, EXH. 42, at 21). TBS cites no documents for this claim.

Time Warner's interrogatory responses indicate that three of this system's 39 activated channels are being used by a broadcast station that was added since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 6). Neither TBS nor Time Warner have alleged that any broadcaster asserted channel position rights under the Cable Act on this system.

16. *Turner Classic Movies (TCM)*

Turner Classic Movies (TCM) has not alleged any injury on 283 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 42 (listing TBS' claims of injury). TCM's allegations relating to the eight remaining Time Warner systems are as follows:

A. *Fayetteville, AR.* TCM alleges that this system is unable to add TCM because the system added two broadcasting stations pursuant to retransmission consent. (DAE VOL. VII.B., EXH. 42, at 20). This allegation is based on what the cable system told them. There is no indication the system declined to carry TCM because of must carry, or that the system had any interest in carrying TCM.

Time Warner has indicated that this system has added *no* must carry stations since the Act's requirements became effective. Since that time, the station has added 14 other cable programming networks. (DAE VOL. VII.O, EXH. 369, at TWS232830).

B. *Shreveport, LA.* TCM alleges that this system has been unable to add TCM because it has no channel capacity or plans to rebuild. (DAE VOL. VII.B., EXH. 42, at 21). TCM made reference to a document which, it confltends, supports this claim, but that states only that this system has been affected by must carry.

Time Warner's interrogatory responses indicate that only one of the system's 40 activated channels is being used to carry a must carry station that was added since the Act became effective.. (DAE VOL. VII.B, EXH. 53, at 4). TCM's allegations indicate that this system had also added 8 other cable programming networks since that date. (DAE VOL. VII.B., EXH. 42, at 21).

Time Warner's interrogatory responses also indicate that the system has plans to increase its channel capacity by 30 channels during the next four years. (DAE VOL. VII.B., EXH. 56, at 1).

C. *Archdale, NC.* TCM alleges that this system is unable to add TCM because it has no capacity and a rebuild of the system will not be completed "for some time." (DAE VOL. VII.B., EXH. 42, at 21). TCM did not provide any documents supporting its allegation or indicating that this Time Warner system had any interest in carrying TCM. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that three of this system's 36 activated channels are being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added three other cable programming networks. (DAE VOL. VII.B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B., EXH. 57, at 5).

D. *Asheboro, NC.* TCM alleges that this system is unable to add TCM because it has no capacity and a rebuild of the system will not be completed "for some time." (DAE VOL. VII.B., EXH. 42, at 21). TCM did not provide any documents supporting its allegation or indicating that this Time Warner system had any interest in carrying TCM. *See* DAE VOL. VII.B, EXH. 42, at 21.

Time Warner's interrogatory responses indicate that three of this system's 38 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 5).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 77 channels within the next four years. (DAE VOL. VII.B, EXH. 57, at 5).

E. *Hampton, VA.* TCM alleges that this system failed to add Turner Classic Movies because of lack of channel capacity. (DAE VOL. VII., EXH. 42, at 26). This allegation is based on what they were told by the cable system. The document upon which this allegation was based does not indicate that must carry is the cause of this system's lack of capacity.

Time Warner has indicated that this system has added *no* must carry stations since the Act's requirments became effective. (DAE VOL. VII.O, EXH. 369, at TWS00232983).

Time Warner's interrogatory responses also indicate that the system has plans to increase its channel capacity to 78 analog channels during the next four years. (DAE VOL. VII.T, EXH. 484).

F. *Cincinnati, OH.* TCM alleges that this system cannot launch TCM until its complets its rebuild. (DAE VOL. VII.B, EXH. 42, at 26). This allegation is based on what they were told by the cable system. This document does not indicate that the system's decision not to add TCM is based on must carry.

Time Warner has indicated that one of this system's 60 activated channels is being used by a broadcast station that was added since the Act became effective. Since that time, this cable system has also added 5 other cable programming networks. (DAE VOL. VII.T, EXH. 492, at TWS00232193).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 18 channels over the next four years. (DAE VOL. VII.B., EXH. 56, at 14).

H. *Greensboro, NC.* TCM alleges that this system has added 3 must carry stations and has failed to add TCM due to lack of capacity. (DAE VOL. VII.B, EXH. 42, at 21). TCM cites no documents for this claim.

Time Warner's interrogfiatory responses indicate that three of this system's 39 activated channels are being used by broadcast stations that was added since the Act became effective. (DAE VOL. V..B., EXH. 53, at 6).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 70 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484). According to TCM's allegation, this upgrade will be complete in July of 1995, giving TCM the opportunity to compete for over 30 open channels.

I. *Kansas City, MO.* TCM alleges that this system was unable to add TCM due to lack of capacity. (DAE VOL. VII.B., EXH. 42, at 1). Neither TCM's allegation nor the document cited make any reference to must carry.

Time Warner has indicated that this system has added *no* must carry stations since June of 1993. (DAE VOL. VII.O. Exh. 369, at TWS00232398).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 78-80 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484).

17. *The Family Channel (TFC)*

The Family Channel (TFC, or Family) has not alleged injury on *any* of Time Warner's 291 cable systems. *See* DAE VOL. VII.A., EXH. 39 (listing TFC's claims of injury).

18. *The Game Channel (TGC).*

The Game Channel (TGC) has not alleged injury on 290 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 39 (listing TGC's claims of injury). TGC's allegation relating to the one remaining Time Warner system is as follows:

A. *San Diego, CA.* TGC alleges that this system is unable to add TGC because it has no capacity. (DAE VOL. VII.A., EXH. 39, at 7). This allegation is based on what they were told by the cable system. The document cited does not indicate that this was caused by must carry, or that the system had any interest in carrying TGC.

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act's requirements became effective. Since June 2, 1993, the system has added five cable programmers. (DAE VOL. VII.B., EXH. 53, at 19).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 26 channels within the next four years. (DAE VOL. VII.B., EXH. 56, at 6).

19. *The History Channel (THC)*

The History Channel does not allege any injury on 286 of Time Warner's 291 cable systems. *See* DAE VOL. VII.A., EXH. 35. THC's allegations relating to the five remaining Time Warner systems are as follows:

A. *Shreveport, LA.* THC alleges that this system is "unable to add THC until upgrade." (DAE VOL. VII.A., EXH. 35, at 2). This allegation is apparently based on a statement by the system to THC that the system's upgrade should be completed by February 1995 and that THC would be a "strong contender" for inclusion. There is no indication that the system declined to carry THC earlier because of

must carry problems or was interested in carrying THC earlier.

Time Warner's interrogatory responses indicate that only one of the system's 40 acivated channels is being used to carry a must carry station that was added since the Act became effective. (DAE VOL. VII.B, EXH. 53, at 4). Time Warner's responses also indicate that the system has plans to increase its channel capacity by 30 channels during the next four years. (DAE VOL. VII.B., EXH. 56, at 1).

B. *Manhattan, New York.* THC alleges that this system is unable to add THC because it has no capacity. (DAE VOL. VII.A, EXH. 35, at 2). This allegation is based on a THC document stating that the system is channel locked. The document does not state that the system's failure to add THC is related to must carry requirements or that the system had any interest in adding THC.

Time Warner's interrogatory responses indicate that two of this system's 77 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B, EXH. 53, at 28). Since that time, this cable system has also added five cable programming networks. (*Id.*)

C. *Staten Island, NY.* THC alleges that its launch was cancelled due to anticipated addition of three must carry stations on this system. (DAE VOL. VII.A, EXH. 35, at 3). THC did not provide any documents supporting its allegation or indicating that this Time Warner system had any interest in carrying THC. *See* DAE VOL. VII.A, EXH. 35, at 3.

Documents produced at the deposition of Time Warner's designee showed that, at the time, this system has available channel capacity which could have been used to carry the History Channel. DAE VOL. VII.O, EXH. 369, at TWS232520. Time Warner's

interrogatory responses indicate that this system has added only one must carry station since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 28). The system has a total of 77 activated channels. Since June 2, 1993, the system has added nine other cable programmers (DAE VOL. VII.B, EXH. 53, at 28).

This system has plans to add 75 analog channels and 200 digital channels during the next four years. (DAE VOL. VII.B., EXH. 56, at 9).

D. *Berks, PA.* THC alleges that this system is "unable to add THC" because it has "no capacity." (DAE VOL. VII.A, EXH. 35, at 3). This allegation is based on what the cable system told THC. The document cited does not attribute this to must carry requirements, nor does it indicate that the system has any interest in carrying THC.

Time Warner has indicated that this system has added *no* must carry stations since June of 1993. (DAE VOL. VII.T, EXH. 491, at TWS00232662-63). The responses also indicate that this system has added 1 other cable programming network since that date. (DAE VOL. VII.T, EXH. 491, at TWS-00232661).

E. *Savannah, GA.* THC claims that this system was unable to add the History Channel. (DAE VOL. VII.A, EXH. 35, at 3). THC cites no documents in support of this allegation.

Time Warner's interrogatory responses and documents show that this system is carrying the History Channel full-time at channel 33. (DAE VOL. VII.O, EXH. 369, at TWS00232796).

20. *Turner Network Television (TNT)*

Turner Network Television (TNT) has not alleged any injury on 289 of Time Warner's 291 cable systems.

See DAE VOL. VII.B., EXH. 42 (listing TNT's claims of injury). TNT's allegations relating to the two remaining Time Warner systems are as follows:

A. *Manhattan, NY.* TNT alleges that this system repositioned TNT to a higher channel. (DAE VOL. VII.B, EXH. 42, at 21). This allegation is based on what they were told by the cable system.

Neither Time Warner nor TNT even alleged that any must carry added onto this system (or any broadcast station already being carried) asserted any channel position rights that caused TNT to be moved (until their briefs in this case).

B. *Columbus, OH.* TNT alleges that this system repositioned TNT due to the addition of a must carry station. (DAE VOL. VII.B., EXH. 42, at 21).

Neither Time Warner nor TNT have even alleged that any must carry added onto this system (or any broadcast station already being carried) asserted any channel position rights that caused TNT to be moved.

21. *The Travel Channel (Travel)*

The Travel Channel (Travel) has not alleged any injury on 282 of Time Warner's 291 cable systems. *See* DAE VOL. VII.B., EXH. 44. Travel's allegations relating to the nine remaining Time Warner systems are as follows:

A. *Bakersfield, CA.* Travel alleges that this system dropped Travel because of a lack of channel capacity. (DAE VOL. VII.B., EXH. 43, at 12).

Time Warner itself does not claim that it dropped the Travel Channel because of must carry. Indeed, Time Warner has indicated that only one of the system's 61 activated channels is being used by a broadcast station that was added since the Act became effective. (DAE VOL. VII.O, EXH. 369, at TWS-

00232077). Moreover, Time Warner claims *not* that it has to drop the Travel Channel, but that it had to combine other channels and could not add Court TV. (*Id.*) In addition, this system had an unused activated channel that it could have used to add the Travel Channel. (*Id.*) The Travel Channel was dropped from this system due to the operator's preference, not must carry. Since June of 1993, the system has also added 8 other cable programming networks. (DAE VOL. VII.B., EXH. 53, at 8).

B. *Orange, CA.* Travel alleges that this system was unable to add Travel. (DAE VOL. VII.B., EXH. 43, at 12).

Time Warner's interrogatory responses indicate that only 4 of the system's 52 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 54, at 1). This system at least added Valuevision, a home shopping cable programmer, rather than the Travel Channel. *See* DAE VOL. VII.T, EXH. 497, at TWS00232850.

C. *Terre Haute, IN.* Travel alleges that this system was unable to carry Travel full-time. (DAE VOL. VII.B., EXH. 43, at 12).

Time Warner's interrogatory responses indicate that this system has added *no* must carry stations since the Act became effective. Since that date, the rebuilt portion of the system has added 19 other cable programming networks, and the non-rebuilt portion has added two other cable programming networks. (DAE VOL. VII.B., EXH. 53, at 32).

D. *Albany, NY.* Travel alleges that this system was unable to carry Travel full-time. (DAE VOL. VII.B., EXH. 43, at 13).

Time Warner has indicated that 2 of this system's 40 activated channels are being used by broadcast sta-

tions that were added since the Act became effective. Since that time, this cable system has also added 10 other cable programming networks. (DAE VOL. VII.B, EXH. 56, at 1). Moreover, according to the system's April 1, 1995, channel line-up, the Travel Channel is being carried full-time on channel 42 of this system. (DAE VOL. VII.T, EXH. 498, at TWS00231985).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 35 channels within the next four years. (DAE VOL. VII.B., EXH. 57).

E. *Manhattan, NY.* Travel alleges that this system dropped the Travel Channel. (DAE VOL. VII.B., EXH. 43, at 13).

Time Warner, however, does not itself claim that it was forced to drop the Travel Channel because of must carry. Time Warner's interrogatory responses indicate that two of this system's 77 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B, EXH. 53, at 28). Since that time, this cable system has also added five other cable programming networks. *Id.*

F. *Fayetteville, NC.* Travel alleges that this system was unable to add Travel because of a lack of channel capacity. (DAE VOL. VII.B., EXH. 43, at 12). Time Warner's interrogatory responses indicate that this system has added *no* must stations since the Act became effective. (DAE VOL. VII.B., EXH. 54, at 7).

Time Warner's responses also indicate that this system plans to increase its channel capacity by 40 channels within the next four years. (DAE VOL. VII.B., EXH. 56, at 3).

G. *Kingsport, TN.* Travel alleges that this system was unable to carry Travel full-time because of a lack of channel capacity. (DAE VOL. VII.B., EXH. 43, at 13).

Time Warner has indicated that this system has added *no* must carry stations since the Act became effective. (DAE VOL. VII.O, EXH. 369, at TWS-00232968). Since that time, it has added 4 other cable programming networks. (*Id.*)

Time Warner's responsese also indicate that this system will increase its channel capacity to 60 analog channels within the next four years. (DAE VOL. VII.T, EXH. 484).

H. *Lewisville, TN.* Travel alleges that this system was unable to add Travel until 3/9/95 due to must carry. (DAE VOL. VII.B., EXH. 43, at 13). Thus, this system now appears to be carrying the Travel Channel.

I. *Greensboro, NC.* The Travel Channel alleges that this system has added 3 must carry stations and has failed to add the Travel Channel due to lack of capacity. Travel cites no documents for this claim.

Time Warner's interrogatory responses indicate that three of this system's 39 activated channels are being used by broadcast stations that were added since the Act became effective. (DAE VOL. VII.B., EXH. 53, at 6).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 70 analog channels over the next four years. (DAE VOL. VII.T, EXH. 484). According to allegations made by the Turner Broadcasting System, this upgrade will be complete in July of 1995, giving the Travel Channel the opportunity to compete for over 30 open channels.

22. *USA*

USA has not alleged any injury on 288 of Time Warner's 291 cable systems.[2] *See* DAE VOL. VII.B., EXH. 44. USA's allegations relating to the four remaining Time Warner systems are as follows:

A. *St. Louis, MO*. USA alleges that this system moved USA to the "expanded basic" programming tier. (DAE VOL. VII.B., EXH. 44, at 11). This allegation is based on what the cable system told them. This document does not indicate that this was caused by must carry.

Time Warner's interrogatory responses also indicate that this system has added *no* must carry stations since the Act became effective. (DAE VOL. VII.B., EXH. 57, at 2). Moreover, Time Warner has not itself claimed that must carry caused it to place USA on a higher tier, and documents produced by Time Warner show that USA has not changed channel position on this system. (DAE VOL. VII.S, Exh. 478).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 10-12 channels within the next four years. (DAE VOL. VII.B., EXH. 57, at 4).

B. *Columbus, OH*. USA alleges that this system moved USA to the "expanded basic" programming tier because of channel capacity problems. (DAE VOL. VII.B., EXH. 44, at 11). This allegation is based on what the cable system told them. The document cited does not indicate that this was caused by must carry.

Time Warner's interrogatory responses indicate that two of the Eastern District's 34 activated channels and two of the Western District's 77 activated channels are being used by broadcast stations that were

[2] USA alleges injury on a Marion, OH, system, but Time Warner has not indicated that it owns a system in Marion, OH.

added since the Act became effective. (DAE VOL. VII.B., EXH. 56, at 1). Moreover, Time Warner has not itself claimed that must carry caused it to place USA on a higher tier, and documents produced by Time Warner show that USA has not changed channel position on this system. (DAE VOL. VII.S,

C. *Austin TX*. USA alleges that this system placed USA in a programming tier that is higher than the "basic" tier because of channel capacity problems. (DAE VOL. VII.B., EXH. 44, at 12). This allegation is based on what the cable system told them. This document does not indicate that this was caused by must carry.

Time Warner's interrogatory responses indicate that one of this system's 57 activated channels are being used by broadcast stations that were added since the Act became effective. Since that time, this cable system has also added 6 other cable programming networks. (DAE VOL. VII.B, EXH. 53, at 37). Moreover, Time Warner has not itself claimed that must carry caused it to place USA on a higher tier, and documents produced by Time Warner show that USA has not changed channel position on this system and that the system has elected to carry other cable programmers on its basic tier. (DAE VOL. VII.S, EXH. 479).

Time Warner's responses also indicate that this system has plans to increase its channel capacity by 21 channels within the next four years. (DAE VOL. VII.B., EXH. 56, at 10).

23. *HBO and CINEMAX*

HBO has not alleged injury on *any* of Time Warner's 291 cable systems. *See* DAE VOL. VII.B, EXH. 60 and supplements thereto (listing HBO's claims of injury).

24. *Court TV*

A-

C. *Arvin/Lamont, Avenal, and Bakersfield, CA.* Court TV alleges that three systems in Time Warner's Bakersfield division failed to launch Court TV as a result of must carry. (DAE VOL. VII.B, EXH. 60, Att. B).

Time Warner has indicated that, as of the time of the deposition of Time Warner's designee, the Bakersfield system had one open, unused channel and has provided no reason why this system could not carry Court TV full-time. (DAE VOL. VII.O, EXH. 369, at TW00232078). According to Time Warner's interrogatory responses, only one of the system's 61 activated channels is being used to carry a must carry station that was added since the Act became effective and the system has added 6 new channels to its capacity since that time. (DAE VOL. VII.B, EXH. 53, at 8). Time Warner's interrogatory responses also indicate that this system has also added 8 other cable programming networks since that date. (DAE VOL. VII.B, EXH. 53, at 8).

Similarly, both the Arvin/Lamont and Avenal systems are only carrying one must carry station that has been added since June of 1993. Both of these systems have also added cable programming since June of 1993. The Arvin/Lamont system added a pay-per-view channel, the revue Guide, Cal-Span and Showtime. (DAE VOL. VII.B, Exh. 53, App. at 8). The Avenal system, which has only 1,400 subscribers, added the Cartoon Network and Cal-SPAN. (*Id.*).

25. *The Discovery Channel*

The Discovery Channel has not alleged injury on *any* of Time Warner's 291 cable systems. *See* DAE VOL. VII.B, EXH. 45 (listing Discovery's claims of injury).

26. *The Learning Channel.*

The Learning Channel has not alleged injury on 288 of Time Warner's 291 systems. (DAE VOL. VII.B, EXH. 45 (listing TLC's claims of injury). With respect to the three remaining systems:

A. *Paragon, Mt. Vernon, NY.* TLC claims that this system has not launched TLC due to channel constraints caused by must carry. (DAE VOL. VII.B, EXH. 45, at 5). This information was provided by the cable operator.

Time Warner's interrogatory responses indicate that only two of this system's 56 channels are being used for must carry stations added after June of 1993. (DAE VOL. VII.B, EXH. 53). Moreover, this system has chosen to add four other cable programmers, including an second channel of multiplexed Showtime, rather than carry the Learning Channel. (*Id.*) Time Warner's responses also indicate that this system will increase its channel capacity by 22 channels within the next four years. (DAE VOL. VII.B, EXH. 56).

B. *Orlando, FL.* TLC claims that this system has not lauched TLC due to channel constraints caused by must carry. (DAE VOL. VII.B, EXH. 45, at 5). This information was provided by the cable operator. Time Warner's interrogatory responses indicate that five of this system's 53 activated channels are being used by broadcast stations that were added since the Act became effective. Since that time, however, this cable system has also added ten other cable programming networks. (DAE VOL. VII. B., EXH. 53, at 12).

Time Warner's responses also indicate that this system has plans to increase its channel capacity to 77

analog video channels within the next four years. (DAE VOL. VII.T, EXH. 484).

C. *Watertown, NY.* TLC claims that its launch date on this system was "significantly delayed" (until 2/1/95) on this system, but does not indicate when the launch was originally scheduled to occur. (DAE VOL. VII.B, EXH. 45, at 8). This information was provided by the cable operator.

Time Warner's interrogatory responses confirm that the system *is* carrying the Learning Channel, and that the system has added 18 cable programming networks since June of 1993. (DAE VOL. VII.B, EXH, 53).

SUPPLEMENTAL APPENDIX

Part C: Analysis of Time Warner's Systems

The following chart summarizes information provided by plaintiff Time Warner concerning the impact of must carry on its systems. As the chart demonstrates, the vast majority of Time Warner systems do not allege that they had to drop or reposition any programming as a result of must carry. Moreover, for those systems that do allege instances of drops and repositioning, the chart shows that many such systems have added numerous cable programmers since the passage of the Act and plan to expand their channel capacity greatly within the next four years.

The chart includes all systems about which Time Warner's Rule 30(b)(6) designee Charles Ellis was prepared to answer questions as of the date of Time Warner's deposition. For each system (listed alphabetically by Time Warner division), the chart includes the following information:

1) Stations carried pursuant to must carry (derived from plaintiff Time Warner's responses to interrogatories, including DAE VOL. VII.B, EXHS. 53, 54, 56, 57, and 61, as well as documents produced by Time Warner (for the first time) at its deposition);

2) Programming stations not carried prior to June 2, 1993, including both broadcast and cable programming (derived from plaintiff Time Warner's responses to interrogatories, including DAE VOL. VII.B, EXHS. 53, 54, 56, 57, and 61, as well as documents produced by Time Warner (for the first time) at its deposition);

3) Ratio of must carry stations added on the system after June 2, 1993 to the totol number of must carry stations being carried on the system (derived from plaintiff Time Warner's responses to

interrogatories, including DAE VOL. VII.B, EXHS. 53, 54, 56, 57, and 61, as well as documents produced by Time Warner (for the first time) at its deposition);

4) Time Warner's alleged injury, in those instances where Time Warner has claimed that it had to make a programming change as a result of must carry (derived from plaintiff Time Warner's interrogatory responses, including DAE VOL. VII.B, EXHS. 54, 56, 57, 60, and 61);

5) Plans to expand the system's channel capacity in the next four years (derived from plaintiff Time Warner's interrogatory responses, including DAE VOL. VII.B, EXHS. 56 & 57 and DAE VOL. VII.T, EXH. 484).

6) A Comment section. This section draws from other of Time Warner's interrogatory responses, as well as documents produced by Time Warner and excerpts from the deposition of Time Warner's designee Charles Ellis, which is located at DAE VOL. VI.B. Documents cited in this section are collected as a composite exhibit at DAE VOL. VII.X, EXH. 682, in order by Bates number. This section explains Time Warner's failure to prove most of their claims, details its failure to provide adequate discovery on many of the claims, and provides information contradicting the claims made by Time Warner. All of the information in this section, however, comes from Time Warner.

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
							evidence that KNVA asserted a right to any particular channel position.
BAKERSFIELD DIVISION	Arvin/Lamont, CA	KVPT	KVPT Viewers Choice Prevue Guide Showtime Cal Channel	1/2	Added K65EY to channel 18; dropped C-SPAN 2; repositioned Telemundo. Required to carry K65EY or KBAK; abandoned plans to add Court TV.	None.	This system only added one must carry station after June 2, 1993, and is carrying KBAK pursuant to retransmission consent. Thus, the claim that must carry caused the system both to drop C-Span II and to not carry Court TV is simply false; if indeed the system is channel-locked (which is debatable), the system would have had to drop some programmer in order to add Court TV. The system blames must carry for dropping C-Span II, but the system also added Viewers Choice pay-per-view, the Prevue Guide, and Showtime; these networks also beat C-Span II out for carriage on this system. As Time Warner noted in its responses to interrogatories, C-Span II "was dropped due to low viewership." DAE VOL. VII.B, EXH. 56, at 4.
BAKERSFIELD DIVISION	Avenal, CA	KNXT	KNXT Cartoon Cal Channel	1/5	Added KNXT, dropped KBAK. Required to carry K65EY or KBAK; abandoned plans to add Court TV.	None.	This system only added one must carry station after June 2, 1993. Thus, the claim that must carry caused the system both to drop KBAK and to not carry Court TV is simply false; if indeed the system is channel-locked (which is debatable), the system would have had to drop some programmer in order to add Court TV. The system also added the Cartoon Channel after it added KNXT, rather than returning KBAK to

1992

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
							carriage or adding Court TV.
BAKERSFIELD DIVISION	Bakersfield, CA	KVPT	KVPT HBO 2 HBO 3 CMT Encore Hot Choice Adam & Eve Music Choice Cal Channel	1/2	Added K65EY on Channel 18; repositioned a CBS affiliate and The Weather Channel. Required to carry K65BY or KBAK; abandoned plans to add Court TV.	Upgrade in part of system.	According to TW, this system has one unused activated channel that could be used to add video programming. DAE VOL. VII.O, EXH> 369, at TWS00232078. This system has not used this open channel to add Court TV, and thus it cannot claim that must carry caused its failure to launch Court TV. Moreover, this system has launched multiplexed HBO, Country Music Television, Encore, Music Choice, and 2 adult pay-per-view channels since June of 1993. The decision to add these programmers and not Court TV is also unrelated to must carry. TW has not identified what CBS affiliate was moved when KVPT was added.
BAKERSFIELD DIVISION	Taft, CA	KCET	CNBC CMT Community Network Adam & Eve Cartoon	0/1	No allegation of harm.	None.	
BAKERSFIELD DIVISION	Tehachapi, CA	KCET	Community Network Cal Channel PPV Showtime	0/1	No allegation of harm.	None.	
BIRMINGHAM DIVISION	Birmingham, AL	WABM WTTO	The History Channel Cable Health Club	0/4	Added WTJP-TV60, forced to reposition WGN from	None.	Any injury to the Bessemer system by adding WABM and dropping CNBC was short-lived; the

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
			ESPN 2 TLC Encore				
EASTERN PENNSYLVANIA DIVISION	Newport, PA	WITF WGCB WLYH WHP	Viewer's Choice	0/4	No allegation of harm.	None.	
EASTERN PENNSYLVANIA DIVISION	Pottsville, PA	WBRE WYOU WVIA	Encore The Cartoon Network Comedy Central ESPN 2 AHC CMT	0/3	No allegation of harm.	None.	
EASTERN PENNSYLVANIA DIVISION	Reedsville, PA	WTAJ WJAC WKBS WPSX	WKBS	1/4	No allegation of harm.	78 analog video channels.	
FLORIDA DIVISION	Citrus County, FL	WEDU WTOG WUFT WBHS WTSP	WBHS Playboy Cinemax 2 Court TV Action Hot Choice C-Span II HBO 2 HBO 3	1/7	Unble to add the Lerning Channel beause of must carry requirements.	Increase by 26.	Time Warner claims that it was injured on this system because it was not able to the Learning Channel, but the Learning Channel is being carried on this system at channel 43 (TWS00232213). The Learning Channel is one of 9 cable programming services, including multiplexed HBO and Cinemax and 3 pay-per-view channel, that the system has added since June 2, 1993.

1994

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
			TLC				
FLORIDA DIVISION	Melbourne, FL	WRBW WMFE WKCF WACX WBSF WBCC WTGL	WACX WRBW MAX 2 HBO 3 HBO 2	2/7	Unable to add the Learning Channel because of must carry requirements.	77 analog video channels.	This system claims that it was unable to add the Learning Channel because of must carry, but the system was able to add two additional channel sof multiplexed HBO and multiplexed Cinemax since June of 1993.
FLORIDA DIVISION	Orlando, FL	WBCC WMFE W31AU WCEU WBSF WKCF WRBW WIRB WTGL	WRBW MAX 2 HBO 3 Mor Music TV 2 Access Channels WIRB WBCC WBSF Playboy Hot Choice Continuous Hits 1 Continuous Hits 2 Sneak Preview Govt Access WCEU	5/9	Unable to add the Learning Channel because of must carry requirements.	77 analog video channels.	This system claims that it was unable to add the Learning Channel because of must carry, but the system was able to add 8 additional cable programming networks, including a third channel of multiplexed HBO, multiplexed Cinemax, and 4 pay-per-view channels since June of 1993. TW states that this system has a channel capacity of 52, but the system is carrying 53 channels of programming.
FLORIDA DIVISION	Ormond Beach, FL	WCEU WRBW WMFE WKCF	WACX WRBW	2/6	Unable to add the Learning Channel because of must carry requirements.	Increase by 40.	Any injury to this system is short-term only, as the system will be adding 40 channels in the next 4 years.

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
		WACX					
		WTGL					
FLORIDA DIVISION	Winter Haven, FL	WEDU	WBHS	2/7	Unable to add the Learning Channel because of must carry requirements.	Increase by 21.	Time Warner claims that it was injured on this system because it was not able to the Learning Channel, but the Learning Channel is being carried on this system at channel 50 (TWS00232230). The Learning Channel is one of 7 cable programming services, including multiplexed HBO and Cinemax and 2 pay-per-view channels, that the system has added since June 2, 1993. The system also has at least one available channel. DAE VOL. VII.O, EXH, 369, at TWS00232227.
		WUSF	WFCT				
		WTSP	Viewers Choice				
		WTMV	The Weather Channel				
		WCLF	Hot Choice				
		WFCT	HBO 2				
			HBO 3				
			MAX 2				
			TLC				
GREATER BOSTON DIVISION	Lynn/Swampscott, MA	WGBH	Court TV	4/8	Added WMFP-TV62, dropped Univision. Added WNDS-TV50, dropped WWOR. Added WHSH, Channel 66, repositioned Comedy Central and Warner Home Theater. Will add WGOT -60; will drop Hot Choice.	Increase by 25.	TW claims that it is injured by having been forced to drop WWOR and Univision in this system. Rather than keep these stations on the system, this system added 9 other cable programming networks since June of 1993, including 2 additional channels of multiplexed HBO, a channel of multiplexed Cinemax, a channel of multiplexed Showtime, two Time Warner pay-per-view channels, and Court TV, a Time Warner owned programmer. Thus, the addition of must carries did not force this system to drop any cable programming networks. Moreover, this system is undergoing a rebuild and TW's designee indicated that the system does currently have open channels from that
		WABU	Encore				
		WENA	WMFP				
		WGBX	WNDS				
		WUNI	WHSH				
		WNDS	WUNI				
		WHSH	TWHT-Hot-Ch				
		WMFP	ESPN 2				
			Max 2				
			HBO 2				
			HBO 3				
			Showtime 2				
			TWHT-Spice				

1996

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
INDIANAPOLIS DIVISION	Avon, IN	WFYI HSC WMCC WCLJ 40	WCLJ	1/5	Failed to launch pay-per-view because of addition of WCLJ.	75 analog video channels.	This system claims that it was unable to launch a pay-per-view channel due to the addition of a must carry. TW's designee could not identify whether the system had definite plans to add a pay-per-view channel, when the system intended to add a pay-per-view channel, or what programming service was to be added (Ellis Dep. at 266-67). Any "harm" to the system by having to place a must carry on an open channel is short-term, as this system will be adding 39 channels within the next four years.
INDIANAPOLIS DIVISION	Indianapolis, IN	WTBU HSC WNDY WFYI WCLJ 40	WCLJ WTBU	2/6	Added WTBU; dropped Color Weather Radar. Added WCLJ; abandoned plans to launch pay-per-view.	Time Warner has failed to provide this information.	This system claims that it was unable to launch a pay-per-view channel due to the addition of a must carry. TW's designee could not identify whether the system had definite plans to add a pay-per-view channel, when the system intended to add a pay-per-view channel, or what programming service was to be added (Ellis Dep. at 266-67). The system also claims injury because it had to drop its channel which carried a color radar feed of the local weather. The system, however continues to carry the Weather Channel and its February 1995 line-up card shows the Color Weather Radar channel sharing a channel with WTBU. TWS00232370. In its response to Dr. Peter Shapiro's survey, this system admitted that it had only reduced the hours that the weather radar was being carried. DAE VOL.

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
							VII.T, EXH. 502.
INDIANAPOLIS DIVISION	Lizton, IN	HSC WFYI WCLU 40 WTHR	WCLU	1/5	No allegation of harm.	None.	TW claims that this system has 33 channels, with no open channels. The system, however, has been carrying programming on 34 channels since October of 1993 and its channel line-up suggests that it may have available channels (TWS00232372).
JACKSON/MONROE DIVISION	Cleveland, MS	WXVT WABG WMAO WO8CQ		0/3	Added WO8CQ to the basic tier and repositioned QVC.	Increase by 15.	TW has stated that this system has 45 channels, yet the system's March 13, 1993, channel line-up shows programming on 49 channels, as well as 4 channels that are listed as "open" (TWS00232379). This system claims that it was forced to move QVC by the addition of WO8CQ, but there is no evidence that WO8CQ demanded the channel position on which it was placed (or had a right to that channel position) and no evidence as to what channel position QVC was carried on prior to being repositioned.
JACKSON/MONROE DIVISION	Jackson, MS	WAPT		0/1	Forced to forego carriage of several cable programming networks due to the system's obligation to carry WAPT.	77 analog video channels.	TW states that this system has a channel capacity of 42, but the system's Fenruary 1, 1995, line-up card shows programming on 44 channels. The Jackson system does not allege that it was forced to add WAPT; indeed, the system was carrying WAPT prior to the passage of the Cable Act (TWS 00232383), and WAPT is the only ABC affiliate that is carried on this system (TWS00232384).

1998

Division	System	Stations Carried Pursuant to Must-Carry	Programming not carried to 6/2/93	Stations prior	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
NEW ENGLAND DIVISION	Portland, ME	WENH	WENH	IFC	1/1	Would carry alternative programming if it did not have to carry WENH.	78-80 analog video channels.	Time Warner's claim that it would carry alternative programming if it did not have to carry WENH is vague and insufficient. TW has not identified any particular prorgamming that it would carry. Moreover, TW has added 35 cable programming networks to this system since June of 1993, which certainly permit the system to offer diversity of programming to its subscibers. Indeed, the diversity of the system might be increased if the system did not carry 3 channels of multiplexed HBO, two channels of multiplexed Cinemax, two channels of multiplexed Disney, and two channels of multiplexed Shotwime, as well as 6 pay-per-view channels.
			CCN					
			Travel Channel					
			Prevue Guide	TV				
			Food Network					
			Sneak	TCM				
			HSN					
			Action					
			C-Span 2	CH1				
			Bravo	CH2				
			BCNE	CH3				
			Court TV	Hot				
			Choice					
			E!					
			Educational					
			TLC	TMC				
			Faith & Values					
			Encore					
			BET					
			Showtime					
			Cartoon Network					
			Showtime 2					
			ESPN					
			Disney					
			EWTN					
			Cinemax 2					
			History Channel	HBO				
			2					
			Home & Garden	HBO				

Division	System	Stations Carried Pursuant to Must-Carry	Programming Stations not carried prior to 6/2/93	Ratio of Added MCs to Total MCs	Time Warner's Alleged Injury	Plans to Expand Capacity in Next 4 years	Comments
PARAGON CABLE - MANHATTAN	Paragon Manhattan, NY	HSC WLIG WNJN WNYE WXTV WNJU WNYC WLIW WNET WWOR	ESPN 2 Crosswalks Reserved WLIG America's Talking TLC WNJN Sci-Fi WXTV TVFN	3/10	Added WNJM-TV50, repositioned The Box. Added WLIG-Channel 55, repositioned QVC. Abandoned plans to add The Action Channel, TLC and Sci-Fi.	None	The only claimed repositioning injury in this system are shifts in the upper band, in which cable programmers were moved from channels 50 to 66 and 55 to 68. Any injury related to such repositionings is de minimis. TW also claims that it has been unable to launch multiplexing, the Action Channel, the Learning Channel, and the Sci-Fi Channel. But TW's own line-up cards show that the system has added the Learning Channel (ch. 52) and the Sci-Fi Channel (ch. 46). TWS00233021. Moreover, the system has also added ESPN2 and America's Talking since June of 1993. The decision to add these networks represents a choice as against multiplexing and the Action Channel. The system is already carrying six pay-per-view channels, and has one channel which is labelled "reserved" on its March 1, 1995 channel line-up card. Id. A look at the system's February 1, 1993, line-up card shows several channels labelled "reserved" were subsequently filled with programming; this certainly suggests that "reserved" means open and available for use, although TW's designee could not explain what "reserved" means. Ellis Dep. at 448.
PARAGON LOS ANGELES DIVISION	Torrence, CA	KWHY KTBN KHSC KLCS	KWHY KHSC KTBN KLCS	5/10	Added KWHY-22, KTBN-40, KHSC-46, KLCS-58, and KRCA-62. Dropped HSN, one pay-per-view	52-55 analog video channels	TW claims that must carry forced this system to carry EWTN and VISN/ACTS on the same channel. Yet this system's channel line-up does not indicate that the system was carrying EWTN on

2001

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REPLY DECLARATIONS AND EXHIBITS

VOLUME IX

* * * *

Dated: June 30, 1995

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

REPLY DECLARATION OF ROGER N. NOLL

1. My name is Roger G. Noll. I am the Morris M. Doyle Professor of Public Policy in the Department of Economics at Stanford University. I have previously submitted a declaration and rebuttal declaration in this proceeding that set forth an economic analysis of the effects of must-carry rules on the cable television and broadcasting industries, and comment upon the economic analysis that Dr. Stanley Besen provided on behalf of plaintiffs in his first declaration filed on May 26, 1995.[1] I am submitting this declaration in reply to the Second Declaration of Stanley M. Besen, filed June 16, 1995 ("Second Besen Decl.").

2. Dr. Besen's second declaration contains little new analysis or evidence that was not already stated in his initial submission, to which I responded fully in my rebuttal declaration. His response to my initial declaration does not address most of the evidence and economic analysis I set forth. For example, it does not respond to my discussion of the market power of cable television, the evidence from the research literature and findings by government agencies that cable systems exercise their market power over consumers in pricing and carriage decisions, the research literature on the consumer demand for cable television as it pertains to the value of alternative types of programs carried by cable systems, and the research literature about the relationship between program quality and access to potential audiences. For present purposes, therefore, I must address only a few of the issues Dr. Besen raises in his second declaration.

[1] Declaration of Roger G. Noll (May 24, 1995) ("Noll Decl.") (DAE Vol. II.B, Exh. 9); Rebuttal Declaration of Roger G. Noll, (June 14, 1995) ("Noll Rebuttal Decl.") (DAE Vol. VIII, Exh. C).

3. A comprehensive explanation of the incentives of cable systems in deciding whether to carry local broadcast stations, incorporating the effects of vertical integration, opportunities to capture additional revenues from local advertising, and subscriber responses to changes in carriage patterns, is contianed in both of my previous declarations. (Noll Decl., ¶¶ 14-29; Noll Rebuttal Decl., ¶¶ 19-23.) I specifically observed that "[w]hether cable systems have an incentive to drop off-air signals in order to favor their cable affiliates or to capture more advertising depends in part on the response of viewers to drops of local stations," but that, "for the most part cable systems do not face a significant financial incentive to keep local stations other than network affiliates and the primary PBS affiliate." (Noll Decl., ¶ 29.)[2]

4. As stated in my earlier declarations, research on the demand for cable finds that "cable penetration and basic subscirption fees are not substantially affected by marginal changes in channel composition at the capacity level of the vast majority of systems." *Id.* These "econometric studies . . . indicate that dropping the second or third noncommercial station or a UHF independent station has essentially no effect on cable subscripitons." (Noll Rebuttal Decl., ¶ 20.)[3]

[2] Perhaps strong VHF independents belong in this category, but the research literature has been unable to find a substantial effect of carriage of VHF independents on cable penetration or basic cable prices. (Noll Decl., ¶ 29 & n. 34.)

[3] The econometric studies that reached these conclusions are cited extensively throughout my initial declaration. The 1970s studies are summarized in Paul W. MacAvoy (editor), *Deregulation of Cable Television*, Washington: American Enterprise Institute, 1977. The most recent study of which I am aware is John W. Mayo and Yasuji Otsuka, "Demand, Pricing, and Regulation: Evi-

5. Dr. Besen nevertheless states that my analysis fails to account for "the value that cable subscribers currently place on the programming of local broadcast stations," and "ignore[s] the fact that the failure to carry any significant number of the stations that cable subscribers value would result either in a reduction in subscribership or a reduced willingness by viewers to pay for cable subscriptions." (Second Besen Decl., pp. 8, 18.)

6. The above-quoted passages from my prior declarations demonstrate that Dr. Besen's statement is inaccurate. In fact, Dr. Besmen himself ignores the studies of cable demand which "confirm that substituting between low-rated over-the-air television stations and low-rated cable networks, one way or the other, has no effect on subscriber revenues." (Noll Rebuttal Decl., ¶ 20.) Dr. Besen acknowledges that "it is undeniable that cable operators have an incentive to increase their advertising revenues . . . ." (Second Besen Decl., p. 18.) Because cable systems can act on this incentive—without incuring appreciable losses in subscriber fees—by refusing to carry certain UHF independents and PBS affiliates, they can be expected to do so if not constrained by public policy.

7. Dr. Besen likewise states that I "provide no evidence or analysis to indicate that the incentive for cable systems to drop broadcast stations will become significant in the future." (Second Besen Decl., pp. 18, 30.) In the first place, these incentives are significant now, as confirmed, among other things, by the cable industry documents I reviewed in connection with preparing my initial declaration. As to the future, I discuss at some length the recent "growth and potential for still further growth in cable system advertising revenues," and note, in particular, that the development of clusters "enhances the incentives of cable systems not to carry off-air statins." (Noll Decl., ¶¶ 14, 24-26.)

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dence for the Cable Television Industry," *Rand Journal of Economics* 22 (1991). *See, e.g.*, Noll Decl., nn. 5, 19.

8. Furthermore, these incentives are stronger for vertically integrated cable systems, and will increase with the growing horizontal concentration among systems (*id.*, ¶ 26). As MSOs that hold interests in cable programming continue to acquire non-integrated systems, the national market share of vertically integrated systems will also grow. And each acquisition of a non-integrated cable cable system by an integrated MSO increases the system's incentive to drop a local station in favor of a vertically related cable network.

9. Dr. Besen provides no evidence or analysis to support his opinion that the emergence of direct broadcast satellite (DBS) (an event that in fact noted in my initial declaration) (Noll Decl., ¶ 9) constitutes a more powerful countervailing trend that will promote the carriage of local broadcast stations. (Second Besen Decl., p. 26.) In support of this position he offers nothing but his "judgment" (*id.*, p. 25), whereas the facts are that DBS technology does not now, and will not for a number of years (if ever) pose a significant competitive challenge to local

10. The same FCC report to which Dr. Besen alludes (Second Besen Decl., p. 26) concludes that "alternative technologies have not yet reached the subscribership levels necessary . . . to find the existence of vigorous rivalry in the market for multichannel video distribution * * * At present, competitive rivalry in most local . . . markets is largely, often totally, insufficient to constrain the market power of incumbent cable systems."[4] Unless and until the cost to consumers of DBS home receiving equipment drops (it now ranges from more than $700 to $1,500),[5] DBS is unlikely to offer significant competition in communities now served by cable, and is more likely, at least

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[4] FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 96 ¶ 201, 112 ¶ 246 (Sept. 1994) (DAE Vol. VII.L, Exh. 280).

[5] *Id.*, p. 31, ¶ 65.

at first, to grow in uncabled areas.[6] In addition, investments by large cable MSOs in existing DBS ventures also could diminish the long-term potential of DBS as a direct competitor to local cable systems.[7]

11. Moreover, even assuming for the sake of argument that Besen's optimistic assumptions about DBS growth were well founded, there is no reason to believe that this would cause cable systems to carry all or even most local broadcast stations (particularly in light of their countervailing economic incentives). If some cable systems were interested in differentiating themselves from DBS, they could do so by carrying the network affiliates. Dr. Besen does not present any evidence that would allow him to predict with any confidence that cable systems would go beyond this.

12. With reference to vertical integration, I discussed in my initial declaration four separate studies (Klein, Salinger, Waterman & Weiss, and Chipty) (Noll Decl., ¶¶ 18-20), which found that the carriage decisions of cable operators are influenced by vertical relationships with cable networks. Dr. Besen addresses only two of them.

13. He reports Klein's finding that vertically integrated cable operators are slightly more likely than non-integrated systems to carry both affiliated *and* non-affiliated cable networks (Second Besen Decl., p. 28), a result explainable by the fact that vertically integrated MSOs are more concentrated among the major metropolitan areas. Dr. Besen ignores Klein's additional finding, however, that vertically integrated cable systems are also more likely to carry *affiliated* networks than they are to carry *unaffiliated* networks. In my initial declaration (Noll Decl., ¶ 18) I reported both findings, and Dr. Besen

[6] Florence Setzer and Jonathan Levy, "Broadcast Television in a Multichannel Marketplace," *FCC Office of Plans and Policy Working Paper No. 26* 98 (June 1991) (DAE Vol. VII.Q Exh. 415).

[7] *See* Report, *In re Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service* 57, ¶ 105 (July, 1990) (JSCR Vol. I.L Exh. 23).

provides no evidence to refute either Professor Klein's or my conclusion that vertically integrated systems discriminate in favor of their own programming.

14. Dr. Besen next suggests (Second Besen Decl., p. 29) that I have misrepresented Chipty's findings "that integrated cable systems select channels to enhance the value of system partners." (Noll Decl., ¶ 20.) According to Dr. Besen, "Chipty found an effect of vertical integration for onl ytwo program categories of cable programming services," music and shopping, and "that for aill other cabe programming service categories—accounting for 92 percent of all the services in her sample—Chipty apparently found *no effect* of ownership affiliation on the number of services carried." (Second Besen Decl., pp. 29-30, emphasis in original).

15. The facts are these. Chipty (*see* DAE Vol. VII.Q, Exh. 418) performs a number of statistical tests, including the one focused on by Dr. Besen, and others dealing with average carriage rates by category of programming (Chipty, Table 2)and with the extent of duplication versus diversity on the basic cable tier (Chipty, Tables 5, 6). The first of these additional tests finds that vertically integrated systems are likely to discriminate in favor of their own services in three different categories, and less likely to carry their own services in another category, with inconclusive results among the remaining categories.

16. For this reason she subjected two of the categories (music and shopping) to the more careful analysis to which Dr. Besen alludes. She did not replicate the test for the other categories, so that it is incorrect to characterize her results as failing to find an effect of vertical integration for the other types of networks. The second of the additional tests finds that vertically integrated systems offer more diversity across categories than non-integrated systems.

17. Chipty did not conclude from these results that there is "*no effect* of ownership affiliaton" on program-

ming decision. Chipty's conclusions, in her own words, are as follows:

> There are two implications, then, of vertical integration in the cable television industry. First, affiliated downstream markets [cable systems] are more likely to carry channels which enhance the value of their upstream partner. The second implication is that affiliated downstream markets [cable systems] are less likely to carry channels which rival their upstream partner. We find *strong evidence* in support of both implications.

(Chipty, p. 31, emphasis added.) This is the conclusion I reported on May 26. (Noll Decl., ¶ 20.) Dr. Besen attempts to dismiss the finding based on his view that the differences in the carriage behavior of affiliated and non-affiliated systems are small, but Chipty reports that her "estimates should be interpreted in light of the fact that the specifications employed are biased toward underestimating the effect of affiliation on carriage." (Chipty, p. 31.)[8]

[8] Dr. Besen also references *Video Economics* by Bruce M. Owen and Steven S. Wildman, stating that: "Drs. Owen and Wildman . . . review a number of studies of the effect of vertical integration and conclude that [Telecommunications, Inc. (TCI)] does not appear to discriminate against networks in which it has no ownership interest." (Second Besen Decl., p. 29.) The number of studies reviewed by Owen and Wildman is precisely two. One is Klein's, which is discussed above. The other is Robert W. Crandall, "Vertical Integration and Ratios in the Cable Television Industry," Appended to TCI Comments, FCC Mass Media Docket 90-4 . Dr. Crandall tested whether TCI was more or less likely than other MSOs to carry 24 cable networks. Dr. Crandall concluded that TCI was statistically significantly more likely to carry 8 of its 9 affiliates. The ninth coefficient was positive, and had a t-statistic of 1.83, and so actually passes a one-tailed test of significance at the 95 percent level, which is the appropriate test because the relevan hypothesis is whether TCI discriminates in favor of its own networks. Hence, this test actually finds that in 100 percent of the cases, TCI systems discriminated in favor of their vertically affiliated networks. Dr. Crandall also found that, among unaffiliated networks, TCI was more likely to carry seven, less likely to carry three, and equally likely to carry five, using conventional tests of statistical significance. A neutral reading of this finding is that a TCI cable system carries more networks than other MSOs, and that it is, on balance, far more likely to carry its affiliated networks than other cable networks. Thus, the oenclusion of Drs. Owen and Wildman, and reproduced uncritically by Dr. Besen, is inconsistent with the very statistical analysis on which it is based.

18. Dr. Besen states that cable carirage behavior is inconsistent with my theoretical analysis. (Second Besen Decl., pp. 7, 28.) But as I discussed in my rebuttal declaration (Noll Rebuttal Decl., ¶¶ 6-9), the issue is not the fate of stations that are "most-watched" (Second Besen Decl., p. 28), but the fate of the two-fifths of all UHF inudependents, anud more than one-fifth of non-commercial stations, which by Dr. Besen's own calculation were not carired prior to the 1992 Cable Act. Their predicament is precisely as my economic analysis predicts: absent must-carry, these stations will be denied carirage, even though their ratings may be equal to or higher than those of the cable networks that replace them, because of the perverse financial incentives of cable systems seeking to enhance their revenues from advertising.

19. Because I am not willing, like Dr. Besen, to dismiss the stations not carried by cable systems as unworthy of concern, he attributes to me the position that "ratings are a poor indicator of the value to viewers of lightly viewed stations." (Second Besen Decl., p. 20.) In certain cases, ratings may be a poor reflector of value to television viewers, but nowhere have I stated or relied upon this fact. While frequently (but not always, as Dr. Besen's own data illustrate) (*see* Noll Rebuttal Decl., ¶ 6), the stations not carried by cable systems have low ratings, the point is this: even the lowest rated commercial stations attract viewers, and the lowest rated noncommercial stations attract members. Otherwise these stations would not survive, with or without cable carriage. Viewers of these stations are harmed if the stations, for lack of carriage, disappear altogether or must reduce the quantity

and quality of their service. In that case their viewers can no longer exercise their freedom to watch the television programming of their choice. (*See* Noll Rebuttal Decl., ¶ 11.)

20. In taking the opposite view, Dr. Besen suggests that non-cable subscribers would not be harmed by the loss of essentially all broadcast television programming other than the commercial broadcast networks, perhaps VHF independents, and primary PBS stations. (Second Besen Decl., p. 21.) As I noted in my rebuttal declaration, that is equivalent to "saying that [cable] viewers would not be harmed if all but a handful of cable networks also disappeared." (Noll Rebuttal Decl., ¶ 11.) The best that can be said of Dr. Besen's analysis is that he substitutes his personal opinion of the worth of broadcast television programming for an objective evaluation of consumer welfare.

21. Finally, the "Turner plaintiffs" state that my initial declaration contains statements intended to leave the misleading impression that "cable systems do not need *any* broadcast signals to maintain high subscribership levels,"[9] so as to suggest in turn that must-carry is critical to the well-being of the entire broadcast industry.[10]

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[9] Memorandum of Turner Plaintiffs in Opposition to Defendants' Motions for Summary Judgment, p. 21, n. 47.

[10] *See id.*, pp. 46-47. As plaintiffs themselves observe, I did not represent that cable systems do not need *any* broadcast stations, but reported that "for the most part cable systems do not face a significant financial incentive to keep on local stations other than network affiliates and the primary PBS affiliate." (Noll Decl., ¶ 29.) Plaintiffs remark that this statement does not account for strong VHF independents. Between submitting my expert report and filing my initial declaration, I added a lengthy footnote explaining the basis of my observation, and, in any event, clearly stated that the situation most relevant to the must-carry question is the choice between "a cable network [and] a local *UHF* independent or noncommercial station." (*Id.*, ¶ 29 & n. 34, emphasis added). The other statement cited by the Turner plaintiffs (*id.*, ¶ 34) is intended to make the point that expansion of channel capacity will not lead to increased carriage of additional broadcast stations beyond those—network affiliates, possibly some strong VHF independents, and primary PBS stations—necessary to maintain subquoted phrase makes the intent of the statement clear.

22. My rebuttal declaration (which I completed prior to the filing of the Turner plaintiffs' opposition memorandum) takes the *plaintiffs* to task for perpetuating the idea "that the core issue in this case is whether the presence or absence of a must-carry rule for cable television is crucial to the survival of the over-the-air broadcasting industry." (Noll Rebuttal Decl., ¶ 2.) This view of the case is, as I described it, a "straw dummy" intended to divert attention from the real economic issues. (*Id.*, ¶ 5.) I could not have been more explicit that "the absence of must carry would not threaten the survival of the broadcasting industry" (and, for that matter, that "the drop rates [would] be largest for UHF independent stations and noncommercial stations"). (*Id.*, ¶¶ 3,7.)

23. The issue in this case is whether Congress had reason to believe that in the absence of a must-carry requirement significant numbers of broadcast stations would be dropped, denied carriage, or disfavorably repositioned by cable systems, and that the quantity ad quality of their service would decline as a result. For all the reasons I have discussed in this and my preceding declirations, the answer is yes. Dr. Besen's own data prove that hundreds of (mostly) UHF independent and noncommercial stations will not be carried if cable systems are permitted to operate without a mandatory carriage requirement. Congress properly considered so large a number of stations, and their quality of programming service, as important to the welfare of non-cable viewers.

June 22, 1995

/s/ Roger G. Noll
ROGER G. NOLL

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REPLY DECLARATIONS AND EXHIBITS

VOLUME IX

* * * *

Dated: June 30, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

REPLY DECLARATION OF JAMES N. DERTOUZOS

I, James N. Dertouzos, for my reply declaration pursuant to 28 U.S.C. § 1746, depose and say as follows:

1. I have reviewed the Second Declaration of Stanley M. Besen, and the Rebuttal Affidavit of Linda McLaughlin, both submitted on behalf of plaintiffs in this case. I have found no new evidence, theory, or logic to alter my conclusion that important social costs will arise if cable operators are not required to provide carriage to local broadcast stations that request it.

2. Must-carry requirements are necessary to prevent cable operators from exploiting their market power and from acting on their incentives to discriminate against local broadcasters in order to reduce competition for subscribers and advertising revenues. Must-carry benefits significant numbers of local broadcast stations whose economic vitality is threatened by lack of carriage, and promotes the welfare of viewers, including both cable and non-cable subscribers.

Dr. Besen's Second Declaration

3. My conclusions and supporting analyses are described in my declaration and rebuttal declaration, and need not be reepated here. For the most part, Dr. Besen has merely rehashed the same arguments mad in his earlier declaration. Accordingly, there are few new points that Dr. Besen raises in response to my previous analyses that warrant additional comment.

4. Dr. Besen is critical of my interpretation of my empirical analysis, which shows that carriage of additional broadcast stations decreases cable systems' advertising revenues, and, therefore, that cable operators operators operate under strong incentives against carriage of broadcast stations. Dertouzos First Decl., ¶¶ 25-29. Dr. Besen offers no criticism of my methodology or estimated relationships.[1] Instead, he argues that dropping a station with a small audience would have no significant effect on cable advertising revenues. And because cable systems carry broadcast network affiliates and most VHF independents and primary public stations, he concludes that the pursuit of advertising does not motivate the carriage decisions of cable operators. Second Besen Decl. at 40-42. This reasoning is flawed in two important respects.

5. First, Dr. Besen once again ignores the all-important reverse causation between audience size and cable carriage. That is, the stations not carried by cable operators are at a distinct disadvantage because they are, in effect, not available to cable subscribers.[2] As a result, they never have the chance to become viable competitors in the local advertising marketplace, and even those now carried would still suffer the lingering effects of previous non-carriage. Dertouzos Rebuttal Decl., ¶ 20.

6. Second, Dr. Besen's studies of past cable system carriage behavior do not reflect future incentives either to drop, or, perhaps more importantly, to refuse to carry new stations, even when channel capacity grows dramatically.[3] As is documented in my declaration, the importance of advertising has been growing rapidly, and is expected to continue its double-digit growth well into the next century.[4]

[1] Indeed, he acknowledges that the existence of such a relationship should be taken as given. "[T]he qualitative result that cable television and broadcast television compete in the sale of the advertising in entirely unexceptional." Second Besen Decl. at 41.

[2] My own analysis of Dr. Besen's data (*see* Dertouzos Rebuttal Decl., Table A-7) demonstrates this important causal relationship.

[3] Interestingly, Dr. Besen acknowledges this ongoing expansion and argues that because of it, operators with greater capacity to carry large volumes of cable network programming (including their own), will become more willing to accommodate additional broadcast stations. Dr. Besen fails to explain how, then, the cable industry's continued resistence to must-carry regulations can be explained, except by a motive to suppress potential broadcast competition.

7. Dr. Besen argues that the emergence of direct broadcast satellite service (DBS) could counteract this trend, reasoning that cable operators will seek to distinguish themselves from DBS services that do not carry local broadcast signals. Second Besen Decl. at 4. That may be the case insofar as network affiliates and primary noncommercial stations are concerned, but for additional broadcast stations the dynamics of the situation are quite different. If DBS competition cuts into systems' subscriber revenues, their imperative to penetrate local advertising markets will increase. Thus, DBS competition would increase, not decrease, the importance of local advertising to cable operators and heighten the incentives against carriage of these additional stations.

8. Dr. Besen also claims that I have misinterpreted the results of my own regression analysis by ignoring the correlation between the number of broadcast stations *carried* by a cable system and the number of broadcast stations *present* in the same community (whether they are carried or not). Second Besen Decl. at 41-42.

9. Specifically, Dr. Besen reasons that "the number of broadcast signals carried is actually a proxy for the number of local over-the-air broadcast signals in the cable system's service area." *Id.* at 42. He concludes, therefore, that when I contrast, for example, the advertising revenues

[4] As I demonstrate, the current percent of total revenues attributable to advertising vastly understates the prospective importance of this revenue source to net income growth.

of a system that carries eight broadcast stations to the advertising revenues of a system that carries four stations, the comparison is between one system that carries eight of eight available local stations, and a second system in a different locality that carries four of four available broadcast stations. Dr. Besen then raises the possibility that the difference in the two systems' advertising sales can be explained by the fact that there are more broadcast competitors in the first market (eight) than in the second market (four), and not the fact that four more are *carried* in the first market (eight) than in the second market (four).

10. When I first began my empirical analysis, I considered this possibility at some length, but concluded that it would not detract from the validity of my analysis, for the following three reasons. First, "the number of broadcast signals carried" is not, in fact, a "proxy for the number of local over-the-air broadcast signals in the cable system's service area." Although station carriage and station availability are somewhat correlated at low numbers of available stations, the match is far from perfect as the number of stations grows.

11. For example, I have examined Dr. Besen's own data that indicate that in communities served by only four broadcast stations, almost half the local cable systems carried fewer than all four stations. The number of stations typically carried in markets receiving eight broadcast signals is little more than six. In markets served by 11 stations, the number actually carried is about eight. For markets receiving more than 11 signals cable operators do not, on average, increase the number of signals carried. In other words, there is no correlation between the number of signals present and the number of signals carried by these systems.

12. Dr. Besen himself reports that nearly 40 percent of UHF independents and 22 percent of noncommercial

stations were not carried in 1992.[5] It is difficult to see how, in light of his own data and conclusions, that Dr. Besen can call broadcast station carriage a proxy for station availability. My results cannot be dismissed on the ground that carriage of four stations (for example) necessarily implies the *presence* of only four stations.

13. Second, Dr. Besen himself correctly asserts that stations not carried are unlikely to be factors in local advertising markets. Second Besen Decl. at 42. In a market where the local system carries four of *four* available broadcast stations, the cable system's advertising revenues are not likely to differ significantly from those of the system that carries only four of *eight* stations, because, as Dr. Besen observes, the four non-carried stations in the second market—precisely because they are not carried—are not going to be factors in the market. For this reason as well, my analysis reveals the impact on cable systems' advertising revenues of *carrying* local stations, not simply the *presence* of local stations.

14. Third, the validity of this approach is supported by studies, conducted during the "non-must carry" period prior to the 1992 Cable Act, to assess the competitive impact of over-the-air television stations on cable systems.[6] Such studies indicate, for example, that the addition of a sixth, seventh or any number of additional broadcast stations to a market already served by five local stations will not reduce cable subscription fees to any measurable degree. That is to say, the mere presence of any number of additional stations beyond the first five does not affect

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[5] Dr. Rohlfs reports that upon application of the correct averaging and weighing techniques, Dr. Besen's data actually show that commercial independent stations were denied carriage nearly 50 percent of the time, and non-commercial stations were denied carriage 36 percent of the time. Rohlfs Rebuttal Decl., ¶ 3a.

[6] See, for example, Robert W. Crandall, "Regulation, Competition, and Cable Performance," Appended to TCI Comments in FCC Mass Media Docket 89-600.

cable subscriber revenues in the manner that Dr. Besen suggests their presence would affect cable advertising revenues.

15. That result can easily be explained by the fact that stations other than the four network affiliates and a single non-commercial station experience dramatically diminished chances of carriage. In other words, the sixth, seventh and other additional stations whose presence in the market has no competitive impact on cable systems are also quite likely to be stations ont carried. Hence, these previous competition studies buttress by implication the conclusion that *carriage* of broadcast stations, not simply their availability, determines their competitive impact on cable systems' advertising revenues. However, my results indicate that additional signals, *if they are carried*, can have a significant effect on cable advertising.

16. For these reasons, I adhere to my conclusion that cable systems operate under powerful financial disincentives to carry local broadcast stations, notwithstanding Dr. Besen's critique, for it is carriage of local stations, not merely their presence, which makes them effective competitors in the local markets for both advertising revenues and subscribers.

17. The regression results I report indicate that, on the margin, an increase in the number of signals carried from, for example, 7 to 8 will reduce advertising revenues by over ten percent. For a system earning 6 percent of its revenues via local advertising, this represents more than 20 cents of pure profit, per subscriber per month. This is higher than the per program incremental income (net of expenses) currently earned under the FCC's "going forward" rate regulations that enable cable operators to raise basic cable rates by 20 cents for each new program offering.

18. The decision about whether or not to carry a broadcast station will be based on such comparisons of

changes in revenue. Mr. Zipin, in his affidavit, states that because total advertising revenues are less than the aggregate license fees for cable programming, advertising will not be a significant factor in programming decisions. This total revenue/fee comparison is irrelevant to the crucial carriage decisions *on the margin* that focus on incremental differences in profits that occur as a result of dropping a broadcast station. For example, if a cable operator carries 25 cable program networks it is probable that the total carriage fees paid for this programming would exceed advertising revenues. But this is irrelevant to the cable operator's decision about whether or not to carry a broadcast signal on the 26th or 27th channel of his cable system. Because the cable operator can possibly earn advertising revenues in excess of carriage fees if he carries cable programming networks on these two channels, he has no incentive to carry broadcast signals instead. Also, the broadcast signals that might be carried on these channels would compete for audience share, thereby diminishing advertising revenues earned by the cable operator on his other channels.

19. Dr. Besen also criticizes my finding that the number of cable program services do not appear to be negatively correlated with the number of local broadcast signals carried. In his second declaration, he contends that my analysis is flawed because I have not controlled for system capacity. Dr. Besen's point would be correct if channel capacity was fixed and simultaneously determined both the number of cable networks and broadcast stations carried by operators in the long run. However, in my declaration, I explain that this was not usually the case and, instead, operators choose capacity levels to accommodate the volume of programming they wish to carry. Evidence demonstrating this proposition is available from two sources.

a. Previously published analysis of programming decisions by operators indicate that the number of cable net-

works carried is not correlated with channel capacity, with the exception of the very smallest systems with fewer than 25 available channels.[7]

b. Dr. Besen's own data set indicates that the carriage decisions of operators are independent of channel capacity. For example, his regressions (see Table C-14 of his first declaration) indicate that the probability of station carriage is not significantly influenced by the number of available channels.[8] Indeed, tabulations of his data indicate that 77.7 percent of all broadcast stations are carried by systems with capacity of lower than 30 channels. For the category of systems with between 30 and 60 available channels, the percentage of stations carried is virtually identical at 77.3 percent. Even the very largest systems, with more than 60 channels, carry only 80.2 percent of all stations, an insignificant differences.

20. In her rebuttal affidavit, Linda McLaughlin claims that advertisers "are particularly interested in ratings because they want to know how many people will likely watch their commercial messages." McLaughlin Rebuttal Decl. ¶ 2. Although ratings provide a measure of the percent of total television audience that is likely to view a single commercial, they provide very little information about how many different people are likely to hear a message that is aired multiple times. Cumes, which do not double count the same individuals who watch for long periods, are a much better measure of the aggregate audience likely to be reached via multiple messages. In my previous work for the Department of Defense in accessing the efficacy of alternative schemes for allocating their 80 million dollar (during the late 1980s) advertising

[7] See, for example, regressions reported in James N. Dertouzos and Steven S. Wildman, "Competitive Effects of Broadcast Signals on Cable," February 22, 1990.

[8] Although this negtaive result does not prove that capacity has no influence, the absence of a measurable correlation makes his criticism of my analysis irrelevant.

budget, maximizing cumulative audiences was a central element of the recruiting strategy.

21. Plaintiffs' experts also claim that clustering and interconnects are unlike to be factors in markets for advertising. The significant correlations between advertising revenues and cable system characteristics such as size and MSO affiliation, documented in my declaration, make it clear that there are major advantages associated with the linkage of previously independent systems both because of shared capital investments and reduced transactions costs on the part of advertisers wishing to reach a broader regional audience. These motives are clearly stated in the numerous strategic plans and statements of executive of multiple system operators that are a part of the court record. With the continued replacement of "soft" interconnects, based on the less efficient transfer of tapes, with hard wire, microwave, and satellite linkages, such marketing cooperatives are certain to become even more important in the future. Indeed, many of the interconnects are posting 30 percent annual gains in advertising revenue and are, according to the 1994 Paul Kagan Associates Cable Advertising Report, "the stars of the industry's sparkling performance."

22. In his declaration, Gregory L. Klein cites Paul Kagan projections that by 2003 local advertising will "still only account for 5 percent of total system revenue." This comparison with current percentages is misleading and significantly understates the importance of advertising. First, the cited total revenue base includes categories such as telephone, video game, and data services. In addition to being highly speculative projections, they have very little to do with the delivery of cable programming and advertising revenues. These latter markets are interrelated since advertising is jointly delivered with programming and the size of the viewing audience is key to attracting ad revenues. When one makes the relevant comparson between projected advertising sales and revenues from pro-

gramming services, the increasing importance of ad sales is apparent, rising from 5 to 8 percent by the year 2000. Of course, this still understates advertising's importance as the primary source of real profit growth over the next decade. As documented in my declaration, fully 40 percent of the anticipated growth in real dollars (adjusted for inflation) is expected to come from advertising. As one MSO executive noted: "This is a revenue source of immense proportions."

23. Plaintiffs' experts also argue that most cable systems only have the capability of doing advertising inserts on a limited number of popular cable networks. Even if this remained true, however, it would not follow that cable systems would not have strong incentive to deny carriage to broadcast stations. This is because the ability to attract ad dollars depends on the strength of broadcast competition for audiences as well as advertising revenues. That is, a cable system operator will have an incentive to weaken broadcast competition by denying carriage, regardless of whether that programming is replaced by an additional cable network. This incentive will also be true for public broadcasting stations that can, when carried by cable, compete for viewers, even though they do not directly compete for advertising dollars.

24. Moreover, it is clear that advertising insertion capability in the industry is increasing and will continue to increase in the future. For example, Dr. Besen's data indicates that some systems are inserting ads on as many as 19 channels. There are strong indications that cable systems will expand this capacity, particularly as they seek to take advantage of scale economics through interconnects and clusters. Indeed, the projected increases in advertising revenues are, in part, based on recognition that these insertion capabilities are improving.

25. The observation that cable operators do not sell all ad avails is largely irrelevant. Even the strongest broadcast stations rarely sell all commercial time. There

is a reason for this. The business objective is not to maximize the number of minutes sold. This could be easily achieved by lowering the price charged. At the extreme, commercial time could be offered free of charge. Cable operators, like any other business enterprise, will maximize revenue (net of costs) by setting price at a high enough level that guarantee that unit volume will fall short of capacity. The point is that cable operators have every incentive to increase their advertising revenues, and will accordingly maximize their ad avails to the extent possible.

26. Plaintiffs' experts argue that cable operators have small incentives to eliminate a local broadcast competitor since the competitor's revenue would be distributed among various other media. Although this is thetoretically true, it is not of practical significance since the local cable operator is likely to be a much closer substitute for the eliminated competitor (in terms of being a lower cost broadcast medium, having a distinct programming niche, narrow geographic reach, etc.) than are other media substitutes. In addition, many small local advertisers wish to use broadcast options but can not afford the absolute cost of a commercial spot on a large network affiliate or VHF independent. Thus, the cable operator is in direct competition [9] with the type of broadcaster that is more frequently denied carriage, the small UHF independent. Thus, the empirical facts presented in my declarations should not come as a surprise. As these analyses demonstrate, the deletion of such a competitor from the channel lineup can dramatically reduce that station's audience and can be linked with a significant gain in local cable operator advertising revenue.

June 28, 1995

/s/ James N. Dertouzos
JAMES N. DERTOUZOS

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[9] However, we have noted that indirect effects on advertising, operating through competition of audiences, can be very important as well.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REPLY DECLARATIONS AND EXHIBITS

VOLUME IX

* * * *

Dated: June 30, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

SUPPLEMENTAL DECLARATION OF ELDON J. HAAKINSON

I, Eldon J. Haakinson, declare as follows:

* * * *

8. Mr. Large purports to evaluate the efficacy of the A/B switch in terms of "consumer electronics equipment functionality" and to demonstrate that there are fewer impediments to the "integration of A/B switches in a modern consumer electronics equipment environment" than I described in my initial declaration. (Large Supplemental Affidavit ¶ 3). Yet, Mr. Large provides no empirical support for his opinions that A/B switches provide high signal isolation. (Large Affidavit ¶¶ 55-56). He simply relies on manufacturers' representations and specifications. However, tests conducted by the cable industry in the mid-1980's found that A/B switches did not always meet manufacturers' specifications. See Attachments 5 and 6 to the NCTA Engineering Committee's Report on the A/B Switch, November 1986. Similarly, Mr. Large's conclusion that A/B switches are durable is based on a review of service calls in a single dual-cable system. (Large Affidavit ¶¶ 63-69). However, dual cable systems need not maintain the same level of isolation as required for cable/antenna switching. In addition,, Mr. Large provides only the most elementary A/B switch connections in support of his conclusion that their installation and use are uncomplicated. In fact, my review of consumer products, documentary evidence and Mr. Large's affidavit and deposition transcript leads me to conclude that there are many possible variations for con-

necting electronics components and the very existence of so many variations in itself is potentially confusing. In fact, Mr. Large's description and redrawing of Figure 10 from my initial declaration illustrate the difficulties consumers face when attempting to integrate A/B switches and other consumer electronics components. (Large Supplemental Affidavit ¶¶ 6-8). Although both drawings are workable means of connecting the same components, a consumer is likely to be confused by the complexity.

9. The only actual "research" conducted and presented by Mr. Large and Mr. Stern is their review of the availability and cost of antennas and A/B switches at retail stores. This research consisted of reviewing catalogs, visiting retail stores, and telephoning manufacturers and retailing chains. Mr. Stern and Mr. Large offer no consumer surveys or studies regarding whether consumers have antennas or A/B switches, consider them easy to install and use, and obtain adequate reception.

10. Finally, Mr. Stern asserts that antenna reception is adequate because 36 million non-cable television households receive television signals over-the-air through the use of antennas. (Stern Affidavit ¶ 21). Although the statement may be true, it is misleading because each household does not necessarily receive quality reception of all the stations predicted to provide an adequate signal. As explained in my initial declarations, signal propagation problems caused by terrain features and man-made structures may cause poor signals. As a result, over-the-air television viewers may receive no reception or poor reception of local broadcast stations. (Haakinson Declaration ¶¶ 14-23). The problem is particularly acute in the case of UHF stations which tend to provide poorer reception.

* * * *

June 29, 1995

/s/ Eldon J. Haakinson
ELDON J. HAAKINSON

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

THIRD DECLARATION OF STANLEY M. BESEN ON BEHALF OF PLAINTIFFS TURNER BROADCASTING SYSTEM, INC., ET AL.

I. Introduction

It is unchallenged that, even in the absence of must carry requirements, cable systems carried the vast majority of those broadcast stations that attracted significant numbers of viewers in non-cable households, and that the combined viewing of the stations that were carried on cable accounted for virtually all viewing in non-cable households. Using the statutory definition, the local stations carried by the system that served the typical cable subscriber accounted for 97% of local station viewing in non-cable households. In short, cable systems voluntarily carried what non-cable households wanted to watch.

The carriage behavior of cable systems indicates that any harm to non-cable households, and to the broadcast industry, if the must carry requirements were overturned, would be extremely small. Moreover, Defendants' experts agree that, even in the absence of must carry, the stations that account for the vast majority of viewing in non-cable households will continue to be carried by cable systems for the foreseeable future. Finally, the exit of a small number of broadcast stations from the industry, especially in view of significant net entry of stations, is fully consistent with a healthy, well-functioning market. Nonetheless, Defendants attempt to support the continuation of the must carry requirements.

Defendants first argue, in effect, that *all* stations should be carried regardless of whether or not they receive a significant amount of or, indeed, any viewing in non-cable households. Defendants do so by proffering as a measure of harm the *number* of broadcast stations that cable systems choose not to carry. This results in giving all stations the same weight whether these stations are lightly viewed or obtain very high ratings. Indeed, these estimates of harm would be unaffected even if the stations that were not carried were watched by *no one* in non-cable households. In fact, I have shown that most of the stations not carried have extremely low, or non-existent, ratings. Because the stations that are not carried in the absence of must carry requirements have extremely low ratings, the welfare of non-cable viewers would be largely unaffected even in the unlikely possibility that these stations were not available to them.

Second, Defendants argue that, despite their low or non-existent viewing, all, or most, or many,[1] of the stations that are not carried nonetheless have high value to non-cable households, and that there would be a significant loss in consumer welfare if these little-watched stations were not available to these households.[2] I reported in my original Declaration that there is a high but not perfect correlation between a station's ratings in non-cable households and the probability that the station will be carried on a cable system. I also presented evidence that a significant proportion of stations with very low ratings *are* carried.[3] Against this *evidence* is Defendants' *claim* that the stations that are not carried are all, or almost all, or mostly highly valued. However, Defendants present *no evidence* that this is the case. Moreover, they ignore the evidence I have presented that cable operators can and do distinguish among stations and offer their subscribers many low-rated stations, including many with no reported ratings at all.[4]

[1] I use this formulation because it is difficult to tell precisely what Defendants are claiming.

[2] I cannot resist observing that the broadcasters' current claim that the number of stations available to non-cable households is now significantly greater than the number available at the beginning of the 1980s *because of cable* is completely at odds with their claims throughout the 1960s and 1970s that UHF stations would be *harmed* by cable. I appreciate that it is possible to change one's mind as new facts emerge, but the broadcasters' earlier claims were at odds with all of the scientific literature, including important work by their own current expert, Dr. Noll ("Cable would improve the position of UHF independents. . . ." R. G. Noll, M. J. Peck, and J. J. McGowan, *Economic Aspects of Television Regulation*, Washington: Brookings, 1973, p. 175). It is difficult to reach any other conclusion than that their earlier claims were merely protectionist and not based on any available evidence or analysis.

Defendants also claim that, since many of the broadcast television stations not voluntarily carried by cable systems have higher ratings than many of the cable programming networks that are carried, cable operators are explicitly acting against the interests of their subscribers by excluding more highly-valued services. This is both unsupported and a red herring. More than 60 percent of the instances of non-carriage in the sample that I studied involved broadcast stations that had *zero* ratings.[5] It is simply not plausible to argue that cable subscribers would prefer all, most, or many of these stations to those services offered by their cable systems. In attempting to remedy any possible instances of non-carriage of significantly valued local stations, the must carry requirements force the carriage of a *much larger* number of stations that are of little or no value to cable subscribers, thus preventing competition on the merits between competing vendors of program services. Must carry imposes a high cost in order to reap, at best, a quite small benefit.

[3] *Declaration of Stanley M. Besen on Behalf of Plaintiffs Turner Broadcasting System, Inc., et al.* ("Besen Declaration"), ¶ 43 and Exhibit 4.

[4] These stations are presumably the ones that are significantly valued by cable subscribers *despite* their low ratings.

[5] Besen Declaration, Exhibit 2.

Furthermore, the comparison of cable network ratings and broadcast television station ratings is not a valid one. It is important to understand that cable program services do not primarily seek—as do broadcast stations—to maximize their audiences, but rather to maximize their attractiveness to cable operators. In doing so, they frequently seek to offer "niche" programming which, although it may be lightly viewed, increases the value of the packages of programs offered by cable operators to their subscribers, and for which cable subscribers and operators are willing to pay directly.[6] By contrast, broadcast stations, which are virtually entirely advertiser-supported, are overtly seeking to provide the programming that attracts the largest possible audiences, rather than the programming that is of the greatest value to viewers. For these reasons, a cable program service with low ratings that *is* carried is much more likely to be highly valued by cable subscribers than is a low-rated broadcast station that *is not* carried, even if the broadcast station has higher ratings.[7]

Third, Defendants advance the theoretical possibility that cable operators have "disincentives" to carry some broadcast stations that are highly valued by non-cable households. Then, without any evidence whatsoever, they appear to contend that all instances of non-carriage are due to such "discrimination." However, the disincentives claimed for cable operators by Defendants are extremely weak. The evidence I have presented on cable carriage patterns is much more plausibly explained by the incentive

[6] The best example of this is probably The Weather Channel. Cable subscribers place a high value on this service although they do not spend much time watching it.

[7] In any event, it is not valid to compare a broadcast stations' share of local broadcast television viewing among non-cable households—the measure used in my study—with a cable program service's share, which is by definition among cable households. Any service's share will, other things equal, be lower, and sometimes substantially lower, among cable households since cable households have many more viewing alternatives.

that cable operators have to not carry services that their subscribers do not value.

Defendants' own expert, Dr. Noll, has repeatedly asserted that "dropping the second and third noncommercial station or a UHF independent station has essentially no effect on cable subscriptions."[8] This is simply another way of saying that those services have little or no value to cable subscribers. The failure of cable systems to carry these stations is, thus, explained by this low value, not by any "disincentive" effect. The fact that many of the stations that are not carried are not carried because they are of little value to cable subscribers, a fact on which Dr. Noll and I agree, seems to have been completely ignored by Defendants in explaining why certain stations are not carried.

When they ascribe to Plaintiffs the argument that ". . . those stations that cable operators discriminate against are not worthy of protection because they are relatively little watched by television viewers. . .,"[9] Defendants both misuse the phrase "discriminate against" to mean "choose not to carry," and twist the argument. The fact that the stations not carried are little watched implies by itself that any harm to non-cable households resulting from the elimination of must carry woulld be minimal. But just as importantly, that fact implies that the "discrimination" argument is not correct. No impure, or "anticompetitive," motive can be ascribed to the choice not to carry a service that is not valued by subscribers. As a result, to the extent Congress was concerned with "fair competition" between broadcast stations and cable program services, the bulk of the Defendants' expert evidence on the absolute numbers of broadcast stations that are not carried is irrelevant.

[8] Noll Rebuttal Declaration, ¶ 20 (p. 12).

[9] *Memorandum of the United States and the Federal Communications Commission in Opposition to Plaintiffs' Motions for Summary Judgment* ("Government's Opposition Memorandum"), p. 4.

Fourth, Defendants continue to claim that vertical integration between cable program services and cable systems is an important factor in explaining why stations are not carried. Besides continuing to ignore the fact that the must carry requirements apply to all cable systems whether or not they are affiliated with cable program services, Defendants ignore or mischaracterize the relevant evidence.

Defendants claim that there are "decades" of economic research on the negative effect of vertical integration on carriage.[10] However, the evidence is far less clear than the Defendants claim. As I noted in my second Declaration,[11] the study on which Dr. Noll primarily relies finds no effect of vertical integration on carriage for almost all types of cable program servces and very small effects for the few types of services for which there is a measured effect. More importantly, *none* of the economic literature, or other evidence that the Defendants reference, directly addresses the question of whether vertical integration affects the carriage of *broadcast stations*, the issue that is before this Court.

I *have* analyzed the effects of vertical integration on the carriage of broadcast stations. My study, which is the only empirical analysis of this question, shows that there is no significant relationship between vertical integration and the carriage of broadcast stations. In response, Defendants' expert Dr. Dertouzos now claims *not* that there *is* a relationship but that, in effect, there *might* be, despite the fact that my study finds none. Thus, a factor that Defendants have long claimed *is* an important factor affecting

[10] The claim that there are "decades" of research is itself misleading since all, or almost all, of the papers cited by Defendants' experts have been produced during the last few years.

[11] *Second Declaration of Stanley M. Besen on Behalf of Plaintiffs Turner Broadcasting System, Inc., et al.* ("Besen Second Declaration"), pp. 27-30.

broadcast station carriage has now been transformed into one that *may* be present. One would have thought that, if this factor were as important as Defendants have claimed it is, they might have been able to present evidence more systematic and generalizable than a few carefully selected anecdotes. Further, when Dr. Dertouzos attempts to redo my analysis, he finds that vertical integration *increases* the carriage of broadcast stations.[12] In short, the Defendants' attempt to characterize my opinions as being at odds with decades of research on the issues before this Court is both wrong and highly misleading.

Defendants also continue to claim that cable operators have an incentive to exclude broadcast stations in order to improve their position in the local advertising market. I have previously addressed this question by showing that the share of local advertising sales accounted for by the stations that are not carried is so small that their exclusion cannot reasonably be ascribed to any resulting advantage in advertisng sales that would accrue to the cable operator. As I have shown, the kinds of television stations that were not carried in the absence of must carry requirements were predominantly ones with low or zero ratings. That is to say, they attracted exceedingly small audiences, and, in the vast majority of cases, would have little advertising revenues.[13, 14]

[12] My reference to this result does not indicate that I support Dr. Dertouzos' particular analysis.

[13] There appears to be no dispute that the stations with a small or nonexistent share of local television advertising viewing have correspondingly small advertising revenues. See, for example, statements by the Association of Independent Television Stations quoted in *Memorandum of the United States and the Federal Communications Commission in Support of Their Motion for Summary Judgment*, pp. 30-31. In addition, R.G. Noll, M.J. Peck, and J.J. McGowan, *Economic Aspects of Television Regulation*, Washington, DC: Brookings, 1973, p. 10, observe that "the price of television advertising, and hence the broadcaster's revenue, is determined by the number of viewers. . . ." F.M. Fisher, J.J. McGowan, and D.S. Evans, "The Audience-Revenue Relationship for Local Television

Furthermore, if they have any viewing (and, thus, advertising revenues), and yet are not carried on the cable system, their viewers (and, thus, advertisers) would not switch in lock-step to the program services on which the cable system sells advertising revenues; rather, most would switch to viewing other broadcast stations that are still available on the cable, or to cable programming services on which the operator does *not* sell local advertising. In addition, some portion of the advertisers would presumably switch to alternative local advertising media. The notion that the cable operator would get any substantial portion of the station's advertising dollars, and thus have an incentive to drop the broadcast station, is extremely unlikely.[15]

Stations," *The Bell Journal of Economics*, Autumn '80, pp. 694-708, reports the results of a study, conducted on behalf of the National Association of Broadcasters, of the relationship between a station's advertising revenues and the viewing of that station. They find a strong nonlinear relationship which indicates that "advertisers do not . . . view two spots on a station reaching a given audience as equivalent to a single spot on a station reaching an audience twice as large." (p. 700) The implication of this finding is that stations with small audiences, like the ones that are predominantly not carried by cable systems, obtain even smaller shares of advertising revenues than their shares of viewing.

[14] To the extent that Defendants argue that, even where a broadcast station has no advertising revenues that might be diverted to the cable operator, an incentive nevertheless exists to replace the broadcast station with a cable network on which the operator could sell local advertising availabilities, their argument is undercut by the fact that cable operators apparently have great difficulty selling out the advertising availabilities they already have. See, for example, *Affidavit of Laurence Zipin* (Exhibit 15 of *Affidavits in Support of Time Warner Entertainment Company, L.P.'s Motion for Summary Judgment*), ¶ 11 ("ad avails are far from sold out").

[15] It is also useful to observe that there is nothing to prevent broadcast stations from competing with cable program services for carriage by offering compensation for that carriage. Under retransmission consent, cable operators may have to pay to carry some local broadcasters, and it is entirely appropriate that some broadcasters be made to pay to effect their carriage.

Defendants wholly mischaracterize this point when they ascribe to Plaintiffs the claim that this is a ". . . perfect world in which monopolists behave and where business people scrupulously respond solely to their customers' wishes, regardless of the effect on their own profit margins." [16] To the contrary, it is precisely the fact that cable operators act to maximize their own profits, combined with the fact that they derive the vast majority of their revenues from subscription fees, that gives them an incentive to carry those broadcast stations that their subscribers value.

The typical cable operator's share of local television advertising sales is well under 5 percent.[17] The typical share of the stations that are not carried by cable systems in the absence of must carry requirements is less than 2 percent. If this were an antitrust case, a claim that a firm with a share of a market as small as 5 percent would find it profitable to exclude a firm with a share of less than 2 percent would be dismissed out of hand. To prove their claim, Defendants might have attempted to compare the gain in advertising revenues from excluding a particular broadcast station with the associated loss in subscriber revenues. They provide no such comparisons.

Finally, in responding to the evidence that those broadcast stations that are not carried are unimportant factors in the local advertising market, so that the failure to carry them cannot reasonably be ascribed to an attempt by cable systems to gain advantages in the local advertising market, Mr. Meek states that the relevant advertising market is one for low-rated advertising vehicles.[18] Further, he ap-

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[16] Government's Opposition Memorandum, p. 19.

[17] The cable industry *as a whole* accounts for approximately 5 percent of all local television advertising sales. Any particular cable system would account for a fraction of that.

[18] Meek Second Declaration, ¶¶ 31-32 (pp. 18-19).

pears to claim that this "market" contains only cable systems and low-rated broadcast stations.

The most fundamental problem with this market definition is that no factual basis has been provided for it. It seems to have been constructed solely for the purpose of this proceeding. To prove their claim of narrow advertising markets, Defendants might have analyzed the relationships among advertising rates for various media, examined buying patterns of advertisers, or interviewed advertisers themselves. They apparently did none of these. For example, other possible competitors in this putative market —radio stations, local newspapers, yellow pages, direct mail advertising, billboards—have not been considered as potential substitutes. If they were, Mr. Meek would have been forced to consider the possibility that a large portion of any alleged decline in broadcast station audiences from non-carriage would redound not to the benefit of the cable operator but to these other competitors, although the cable operator would alone bear the cost of any lost subscribers. Moreover, Mr. Meek has not bothered to explain why significant numbers of low-rated broadcast stations that, under his theory, should not have been carried by cable operators were, in fact, voluntarily carried.

Defendants claim that lightly-viewed stations are of high value to cable subscribers but that they are not carried because of cable operators' incentives to obtain greater advertising revenues and because of vertical integration between cable operators and cable program services. This claim is inconsistent with the evidence. The stations that are not carried have such small viewing, and hence such small advertising revenues, that the corresponding incentive for non-carriage will be minuscule. In addition, there is no systematic evidence that vertical integration results in lower carriage rates of local broadcast stations. Thus, the two reasons offered by Defendants for the non-carriage of some lightly-viewed stations—the desire to gain an advantage in the advertising market and vertical integration

between cable operators and cable program services—cannot explain why these stations are not carried. We are left with only one possible conclusion: the lightly viewed stations that are not carried are not carried because they are not valuable to cable subscribers.

From an economic point of view, this case is largely about how cable operators make decisions regarding which program services to carry. I have put forward striking evidence that cable operators make carriage decisions consistent with the preferences of their subscribers. That is just the type of behavior one would expect in a normally-functioning market for the provision of video programming services. Defendants, on the other hand, have offered only anecdotes and purely theoretical arguments in support of their claims that cable operator carriage decisions are biased against broadcasters, based on anticompetitive incentives, or indicative of a dysfunctional market.

In short, Defendants' claims that: (a) the stations that are not carried by cable systems in the absence of must carry are highly valued; (b) the incentives by cable operators to discriminate against broadcasters are quantitatively significant; (c) vertical integration is important in explaining non-carriage; and (d) cable systems compete only with low-rated broadcast stations in the sale of advertising, are all unsubstantiated by any evidence. Defendants are simply asking the Court to take their word that these claims are all true and have not attempted to marshal any empirical evidence in support of any of them.

II. Cable Systems Voluntarily Carry Stations Accounting for the Vast Majority of Viewing in Non-Cable Households

In my original Declaration in this matter, I reported the results of a study showing that, using my preferred definition of local stations, the stations that were carried in the absence of must carry requirements accounted for 98 per-

cent of non-cable viewing.[19] I drew two important inferences from this result. First, the fact that the broadcast television stations that non-cable households watch are precisely those that are virtually all voluntarily carried by cable systems implies that the removal of must carry requirements would not impose any significant harm on those viewers that choose not to subscribe to cable. In other words, my result provides a measure of maximum harm to non-cable viewers that would result from the elimination of must carry (assuming, contrary to fact, that all such dropped stations would for that reason fail), and that measure shows that any harm would be insignificant. By my measure, the stations that fail to gain carriage have little or no value to non-cable households. In all of the Defendants' efforts to criticize my analysis, they have not advanced a single alternative measure of such value.

Second, this result is inconsistent with Defendants' claims regarding the reasons that cable systems deny carriage to broadcast stations. Defendants provide no reason as to what cable operators could hope to gain by diverting advertising revenues from stations that have virtually none. Given that these stations have little in the way of advertising revenues to divert, the only plausible inference for why they are not carried is that cable subscribers do not value them.

Defendants, without presenting any alternative evidence, or proposing a different estimate of the viewing of the non-carried stations have made essentially two types of attacks. The first is that, because of the ratings data that I have used, my result understates viewing on the stations that are not carried. Mr. Meek suggests that my use of diary ratings rather than metered ratings, ratings that do not include weekend viewing, and ratings from the November sweep month, all bias my results towards finding

[19] Besen Declaration, p. 41.

low viewership among the non-carried stations.[20] All of this criticism is of *no evidentiary* value in casting doubt on the results of my analysis.

First, Mr. Meek provides no alternative calculation that takes these factors into account, so there is no evidence at all that my results would be affected by these considerations. Second, as Mr. Meek himself reports, my figures use the best available evidence: Nielsen does not even report metered ratings for all broadcast stations. Third, there is evidence that my results would *not* change even if I were to take Mr. Meek's complaints into account. I presented in my April expert report—to which Mr. Meek, of course, had access—similar viewership results based on average ratings for all four sweep months (February, May, July, November), and for the entire week. Those results showed that the stations that were voluntarily carried accounted for *99 percent of viewing* in all television households. In short, there is no reason to think that Mr. Meek's concerns have any basis in reality.

Furthermore, Mr. Meek's complaint that some television stations are not attempting to serve the entire ADI is a problem not with my calculation but with the design of the must carry requirements.[21] To the extent that broadcast stations do not reach the entire ADI, not only is the statutory definition of local stations too broad, but must carry forces cable systems to extend the coverage of broadcast stations beyond the area that they would otherwise be able to reach.

The second attack on my results involves my definition of local stations. In my Declaration, I presented results based on a definition of local stations as those within the same ADI as, and within 50 miles of the headend of, a cable system. Defendants criticize this definition. How-

[20] Meek Second Declaration, ¶ 4 (p. 2), ¶¶ 7-8 (pp. 4-5).

[21] Meek Second Declaration, ¶ 6 (pp. 3-4).

ever, the criticisms offered by different Defendants' experts are unjustified and are, in any event, inconsistent with one another. Moreover, I reported in my Declaration calculations based on the statutory definition and obtained essentially the same results as those obtained with my preferred definition. Defendants' criticisms should, therefore, be disregarded.

Dr. Noll attempts to take me to task for "arbitrarily" employing a definition that is different from the one chosen by the Congress.[22] After admitting that the issue is "not theoretical or conceptual, but empirical," he then argues that the ADI definition has the virtue that it is "based on viewer behavior and is accepted as a measure of markets by advertisers, not on arbitrary criteria that are unrelated to viewer and advertiser behavior."[23]

Clearly, my ADI/50 mile definition was intended to describe a local service area that took into account both viewer and advertiser behavior, although it does so imperfectly, in part because many stations outside the typical subscriber's cable system's ADI are also carried. It is thus clearly not based "on arbitrary criteria unrelated to viewer and advertiser behavior." Moreover, apparently Dr. Noll and Mr. Meek have failed to coordinate their stories because Mr. Meek complains that my results "rely on ADI-wide ratings *regardless* of whether the broadcast station being studied is attempting to serve the entire ADI. . . ." (p. 3, emphasis in original). The whole point of using a definition of the local area that is potentially smaller than an ADI—my preferred definition—is that some stations do not serve an entire ADI. If I were to accept Dr. Noll's

[22] Noll Rebuttal Declaration, ¶ 24 (p. 15).

[23] Noll Rebuttal Declaration, ¶ 25 (p. 16). Dr. Noll also claims (arbitrarily?) that "another useful tool for defining markets is the area within a station's grade B contour" (Noll Rebuttal Declaration, ¶ 26, p. 16). Of course, this is not the definition employed by the Congress for commercial stations.

criticism, I could not respond to Mr. Meek's complaint, and *vice versa*.[24]

In any event, there is no need to settle this dispute between Defendants' experts because Dr. Noll's criticism is without empirical content. As I reported in my earlier Declaration, I have also calculated the proportion of viewing in non-cable households that is accounted for by the stations that were carried in the absence of must carry requirements using the statutory (ADI) definition for commercial stations. The results are essentially the same as those I obtained using my preferred definition. Under the statutory definition, *97% of viewing* in non-cable households is accounted for by those stations that were carried by cable systems in the absence of must carry requirements.[25] This is a very small tempest in a very small teapot.

III. Extent of Non-Carriage in the Absence of Must Carry

Defendants understandably focus the Court's attention on evidence of the number of stations that might not be carried by some cable systems if the must carry requirements were eliminated. In doing so, they point to calculations I have made of the proportion of local broadcast stations carried by the typical subscriber's cable system in the absence of must carry requirements. I have argued repeatedly that the number of stations not carried in the absence of must carry requirements does not measure the

[24] Another point of disagreement between Dr. Noll and Mr. Meek is that Dr. Noll argues that "Because audience measures are based on a statistical sampling technique [they] are likely to be inaccurate for low-rated stations and for small, specific geographic areas" (Noll Rebuttal Declaration, p. 16). So it is unclear how one could deal with Mr. Meek's concerns about using ADI-ratings without running afoul of Dr. Noll's strictures about defining the area served so narrowly that ratings are measured inaccurately. Moreover, to the extent that Dr. Noll's concern is justified, Dr. Rohlfs' entire study would be called into question since he used county-level ratings data for a sample of broadcast stations that included many that are low-rated.

[25] Besen Declaration, Exhibit C-6.

benefits to non-cable viewers from those requirements. The Defendants' position is that there is no need to inquire whether anyone values these sources of programming. As an economic matter, it is crucial to conduct such an inquiry and I have done that.

In addition, Defendants misunderstand or misrepresent the meaning of the proportion of local broadcast stations carried in the absence of must carry requirements (without regard to viewing). I have reported that the typical subscriber had access to 81 percent of all local stations, including 99 percent of all local network affiliates, 98 percent of all local Fox affiliates, and 98 percent of VHF independent stations.[26] These figures are undisputed. In addition, the typical cable subscriber had access to 61 percent of UHF independent stations and 78 percent of non-commercial stations.

The latter figures are not only erroneously disputed, but they are consistently mischaracterized by Defendants and their experts. On page 1 of their opposition memorandum, the Government cites my original declaration for the proposition that ". . . 40% of commercial independent UHF stations and more than 20% of all public stations . . . were historically denied carriage by cable operators in the absence of must carry."[27] The erroneous implication is that 39 percent of UHF independent stations and 22 percent of non-commercial stations are *never* carried by *any* cable system. The fact is that virtually every broadcast television station, of any type, is carried on *many* cable systems. If there were 10 cable systems and 10 broadcast stations in a particular locale, and each cable system carried 9 of the 10 stations, I would conclude that the typical cable system carried 90 percent of the local stations, even though each of the 10 stations could be caried by 9 cable systems.

In addition, the percentage of stations that are not carried by the typical subscriber's cable system provides a

[26] Besen Declaration, p. 44.

[27] Government's Opposition Memorandum, p. 1.

distorted impression of the diversity of choices available to non-cable viewers. This is because, as Defendants' experts acknowledge, the markets in which non-carriage is most frequent are also the markets in which, even ignoring the stations that are not carried, non-cable households have a wide array of viewing choices.[28]

Moreover, many of the stations that were not carried by a particular cable system apparently would not even be eligible to be carried by that cable system under the must carry requirements. Some non-commercial stations offer programming that substantially duplicates that of other stations in the ADI. Other stations fail to deliver an adequate signal to the headend of the cable system. Evidence presented by both Plaintiffs and Defendants on the number of stations added by the typical system because of must carry shows that many of the non-carried stations in my sample would not qualify for must carry. For example, as I pointed out in my second Declaration, two-thirds of the drop instances reported by Mr. Meek were apparently uncured by must carry.[29] The significance of this is that the estimates of the number of stations that were not carried in the absence of must carry requirements overstate the number of *eligible* stations that were not carried.[30]

Based on arguments proffered by their expert Dr. Rohlfs, Defendants characterize my calculated average of the proportion of broadcast stations carried by the typical subscriber's cable system as "unusual," "skewed," "biased," and "incorrect." However, Defendants' knowledge of adjectives exceeds their knowledge of statistics. There is nothing incorrect or inappropriate about the average I have employed.

[28] Dertouzos Rebuttal Declaration, Table A-3.

[29] Besen Second Declaration, p. 12.

[30] There is the additional point that many nearby stations that *were* carried are not counted if they were not within the same ADI as the cable system.

Different averages can be informative about different things, and the fact that one average provides a different answer than another should hardly be surprising. As Dr. Rohlfs concedes, "Dr. Besen's methodology would be appropriate if the primary goal of the inquiry was to discover the extent to which local broadcast stations are available to the typical cable subscriber," [31] which is precisely the purpose for which I calculated my average. The fact that Dr. Rohlfs has calculated a different average does not in any way make my average biased or incorrect.[32]

Most importantly, however, Dr. Rohlfs' calculations fail to take into account the viewing of the stations that are carried and those that are not. He would, and does, obtain the same results if the stations that are carried account for a very large or a very small proportion of all viewing, or for no viewing at all.[33] By failing to account for viewing, Dr. Rohlfs' calculations provide a "biased" view of the potential harm to non-cable households from the failure of cable systems to carry some local broadcast stations.

IV. Defendants Still Have Presented No Evidence That Anticompetitive Incentives Exert a Significant Influence on Carriage Patterns

In my original Declaration in this matter, I reported the results of an analysis of the factors that affect the probability that a particular station is carried by a particular cable system, in the absence of must carry requirements.[34] As I explained in that Declaration, the single most important factor in explaining carriage is a station's ratings among non-cable households. In addition, factors that could, as a logical possibility, create anticompetitive incentives for a cable system not to carry a broadcast station appear to be unimportant (i.e., statistically insignificant) in explaining carriage patterns.

Dr. Dertouzos claims that I have incorrectly concluded, on the basis of this evidence, that carriage decisions are not influenced by anticompetitive intent.[35] In doing so, he argues that I have made an elementary interpretive mistake. His argument is deceiving and my conclusion remains valid.

Statistical analysis is often used as a method for estimating whether there is a relationship between one variable and another. Any two variables chosen at random will have some measured relationship between them (e.g., sunspots and recessions). The issue is whether one can reliably conclude that there is a "true" relationship or whether the measured relationship is a chance occurrence. In order to conclude that a real relationship exists, the analyst must have a high degree of confidence that the measured relationship could not have happened by chance.

By conventional standards, to which even Dr. Dertouzos would ascribe, one must find a less than 5 percent probability that a result could be due to chance in order to be confident that the observed relationship is a "true" relationship. This standard is *not* met for the observed statistically insignificant relationship between carriage and vertical integration. Quoting from the source cited by Dr. Dertouzos, a statistically insignificant relationship ". . . doesn't mean that we are sure that . . . [there is no effect]. All it means is that, on the basis of the available evidence, we have no good reason to reject . . . [the prop-

[31] Rohlfs Rebuttal Declaration, ¶ 11 (p. 5).

[32] Moreover, Dr. Rohlfs fails to note an important characteristic of the average he computes. His method gives more weight to cable systems in markets with large numbers of local stations, which usually are ones with somewhat lower proportions of stations carried. (This is separate and apart from the fact that greater weight should be given to systems with larger numbers of subscribers.) As a result, his calculations are "biased" in favor of finding low rates of carriage.

[33] Indeed, in his earlier report, he found that many of the drops he analyzed were stations with literally zero ratings.

[34] Besen Declaration, pp. 50-52.

[35] Dertouzos Rebuttal Declaration, ¶ 1a (pp. 1-2), ¶¶ 8-9 (pp. 6-7).

osition that there is no effect]."[36] Or, as Dr. Dertouzos states, "This is not to say that these increases do or will occur."[37] Dr. Dertouzos is thus trying to claim an effect where there is no reliable evidence that there is one.

Even if one is not prepared to accept *my* conclusion that anticompetitive incentives are not at play, one might be persuaded by Dr. Dertouzos' own result. He reports the results of a regression of his own design that in fact produces the result that vertical integration actually *increases* the probability that a particular station will be carried![38] In every other respect, his new regression provides no new results. By far the most important determinant of carriage, according to Dr. Dertouzos' analysis, is ratings, and the factors that one might advance as a theoretical matter to strengthen any possible anticompetitive incentives to drop broadcasters have no statistically significant impact on carriage patterns.

The fact that ratings is the most important determinant of carriage provides still another example of the conflicting claims made by Defendants' own experts. Mr. Meek claims that I am mistaken that carriage decisions by local cable operators are generally based on ratings.[39] However, regardless of whether cable operators actually know or inquire about the ratings of various local broadcast stations, ratings are shown by my results, and those of Dr. Dertouzos, to be an extremely good predictor of carriage. In that sense, they are demonstrably a very good proxy for all of the factors that cable operators *do* consider when making carriage decisions.

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[36] Edwin Mansfield, *Statistics for Business and Economics*, 3rd ed., p. 472.

[37] Dertouzos Rebuttal Declaration, ¶ 11 (p. 8).

[38] Dertouzos Rebuttal Declaration, Table A-5. The effect is admittedly not statistically different from zero, but under Dr. Dertouzos' style of inference we cannot reject the hypothesis that the effect is positive.

[39] Meek Second Declaration, ¶ 28 (p. 15).

In addition, Dr. Dertouzos has claimed that my regression analysis does not account for the reverse causality between carriage and ratings. To the contrary, I discussed the issue in my Declaration and was careful to point out how I had addressed it:

> . . . the fact that carriage decisions depend on ratings *and* that ratings may depend on carriage decisions raises the possibility that stations with low viewership had low viewership precisely because they were not carried. In order to deal with this possibility, I carried out my analysis using each station's November *1994* audience ratings. Most stations qualifying for must carry would presumably have been carried by them, and their 1994 ratings would better reflect their 'true' viewership.[40]

While Dr. Dertouzos describes the time between the effective date of must carry and November 1994 as "just a few short months," it was in fact almost a year and a half for commercial stations and over two years for noncomercial stations. Moreover, I note that the interim must carry rules that were struck down by the Supreme Court's *Century* decision contained only a one-year grace period for new stations, after which they could be dropped if they did not by then satisfy the viewing standard. Furthermore, the Defendants' experts have themselves used November 1994 ratings to show the purported positive effects of must carry. In any event, at the time of my Declaration, the November 1994 ratings data were the latest available.

I also noted in my Declaration that I had performed a statistical analysis, using 1992 viewing data, that effectively controls for the impact of cable carriage on ratings, and obtained essentially the same results. The statistical technique, known as two-stage least squares or instrumental variables, is the same as that used by Dr. Dertouzos. The results show, consistent with my results

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[40] Besen Declaration, p. 38.

using 1994 ratings, and with Dr. Dertouzos' results, that ratings are by far the most important factor in explaining whether a station is carried, and they show no statistically significant evidence that the factors that might increase the anticompetitive incentives to exclude a broadcast station are important in determining carriage patterns.

In contrast, Defendants have shown *no evidence* of any results to the contrary. Dr. Dertouzos' attempt to show "reverse causality" completely fails. Using my data, Dr. Dertouzos derives a model that purports to show that a broadcast station's (ADI-wide) ratings share among *non-cable households* increases by over 700 percent as a result of being carried by one particular cable system. This is another example of Defendants' own experts contradicting one another. Dr. Rohlfs, in his original Declaration, specifically pointed to his (more plausible) result that broadcast stations dropped by cable systems did *not* experience a decline in ratings among non-cable households. Moreover, while Dr. Dertouzos fails to report his results completely, the manner in which he claims to have corrected for the possibility that November 1994 ratings reflect the "lingering effect" of non-carriage is in error. As a consequence, his reported result is merely a reflection of the fact that the likelihood of carriage on a particular cable system is determined in large measure by a station's ratings. In short, Dr. Dertouzos' "reverse causality" argument is not credible.

V. Continual Growth in the Number of Broadcast Stations Even in the Absence of Must Carry Requiremets Signifies the Financial Health of the Industry

In my initial Declaration, I presented evidence that showed that the number of broadcast stations has grown enormously since 1980, after cable services were effectively deregulated. I also showed that no broadcast market exhibited a decline in the number of stations during this period; many, in fact, showed increases. This evidence was intended to show that the broadcast industry's

health has been robust despite the significant growth in the number of cable subscribers and services that occurred during this period. Moreover, these results are completely at odds with earlier claims made by broadcasters—claims not very different from those they are making in this proceeding—that cable would threaten the existence of many broadcast stations if it were allowed to grow unfettered.

Against this evidence, Defendants make two claims. First, the growth in the number of stations has been slower during the recent non-must carry period than in some previous period. Second, some stations have failed during the non-must carry period.

Early in my efforts in this proceeding, I considered analyzing the effects of the existence of must carry requirements on broadcast station growth. I abandoned this effort, however, when I realized how many factors in addition to, and more important than, must carry such a study would have to take into account. One must control for a host of factors unrelated to the conduct of cable operators, including developments in advertising markets, the entry of new networks, the exhaustion of available frequency allocations, and other regulatory developments if one wishes to measure the separate effect of must carry on station growth. For example, there was a freeze on new UHF broadcast licenses in 30 major cities beginning in the late 1980s in order to reserve spectrum in anticipation of HDTV.[41] In short, I expected that it would be very difficult, if not impossible, to isolate the effects of must carry from all of these other factors.

Defendants do not recognize, let alone attempt to control for, *any* of these other factors in attempting to reach conclusions about the effects of must carry on station growth. They simply *assume* that must carry is the *only*

[41] Federal Communications Commission, *Advanced Television Systems and Their Impact on the Existing Television Service*, Order RM-5811 (Mimeo No. 4074 released July 17, 1987).

factor that affects the number of broadcast stations.[42] Like the blind men and the elephant, Defendants do not recognize factors outside their immediate purview that one must consider to obtain an accurate picture of the whole animal. Their results should, therefore, be ignored. In any event, I would point out that the growth in the number of stations during the recent non-must carry period was *higher* than in the most recent must carry period (i.e., since 1992).

Second, the fact that *some* stations have failed tells us *nothing* about the general health of the broadcasting industry. As I noted in my original Declaration:

> If one station exists but is replaced by another, this reflects the entrant's belief that it can operate successfully although the exiting station could not. In this situation, exit reflects more the ability of the exiting firm than it does the profitability of operating in that market.[43]

The entry and exit of firms is fully consistent with a healthy, well-functioning market. An industry that is marked by significant *net* entry, that is with a significant increase in the number of firms, as is the broadcast industry over the past decade and a half, is economically healthy even if some firms find it unprofitable to continue to operate.

VI. Conclusion

The evidence I have presented in this proceeding shows the following:

1. The stations that were carried by cable systems in the absence of must carry requirements accounted for virtually all local station viewing in non-cable households.

[42] Elsewhere, in other analyses, others of Defendants' experts are aware of the need to hold other factors constant.

[43] Besen Declaration, p. 75.

2. Cable systems do not fail to carry local broadcast stations that their subscribers value either to improve their position in the advertising market or to benefit program services with which they are affiliated.

3. Between 1980, when cable services were effectively deregulated, and the present, many television markets have experienced increases in the number of broadcast stations, and no market has experienced a decrease despite significant growth in the number of cable subscribers and the number of cable program services.

The only inference that can be drawn from this evidence is that non-cable households will be largely unaffected by the elimination of must carry requirements. They will have access to the stations they watch because cable systems will find it profitable to continue to offer those stations to their own subscribers. The claims of broadcasters that their industry is in peril unless they are protected by the government are no more plausible today than they were when they were first made more than thirty years ago.

I declare under penalty of perjury that the foregoing is true and correct.

June 29, 1995

/s/ Stanley M. Besen
STANLEY M. BESEN

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DEFENDANTS' REPLY DECLARATIONS AND EXHIBITS

VOLUME IX

* * * *

Dated: June 30, 1995

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

THIRD DECLARATION OF TOM MEEK

Pursuant to 28 U.S.C. § 1746, I, Tom Meek, submit this supplemental declaration to address certain matters raised by plaintiffs' experts Besen and McLaughlin, and other points raised in plaintiffs' memoranda in opposition to defendants' motions for summary judgment.

Besen's Analysis of My Findings

1. I have reviewed Dr. Besen's analysis of some of the findings (in particular, the "drop study") reported in my earlier declarations. For reasons I will explain, his critique is both limited in scope and, even with respect to the findings he comments on, contains significant errors.

2. In my original declaration, I reported findings based on information reported to the Copyright Royalties Tribunal, and compiled by Cable Data Corporation, by essentially every cable system in the United States. I also explained that this information is routinely relied on by both broadcasters and cable companies. Based on my analysis of this data, I reported findings relating to my reanalysis of the FCC's 1988 drop study; noncarriage of broadcast stations; and, in particular, noncarriage of broadcast stations that commenced operation after the *Quincy* decision (and, thus, had never gained access to cable systems by virtue of must carry provisions). Dr. Besen has chosen to discuss the drops analysis, without comment or critique of the non-carriage analyses.

3. It is significant that Dr. Besen has not even commented on the findings I have reported about non-carriage and, in particular, non-carriage of new stations. This

omission is revealing, because Dr. Besen has reviewed my work and is obviously aware of these findings. Indeed, Dr. Besen's own work reflects his understanding that the most critical issue is whether broadcast stations are being carried by cable systems (and not whether noncarriage resulted from being dropped or from never obtaining carriage in the first place). For this reason, Besen has made no effort to distinguish between drops and carriage denials in computing his own noncarriage figures.

4. Given Besen's own focus on total noncarriage, it is striking that he has no comment on the noncarriage figures I have reported. My research indicates that widespread and increasing noncarriage of broadcast stations on cable systems within their ADI's, reaching 132,000,000 net adjusted subscriber instances by mid-1992. *See* DAE VOL. II.A, Meek Decl. at ¶¶ 54-61, Exhs. E, F. The data also reveals that broadcast stations that commenced operation following the *Quincy* decision (which therefore had not been able to gain access to cable systems pursuant to the must carry rules in effect prior to *Quincy*), had significant noncarriage problems. I have also reported that by mid-1992, independent broadcast stations that signed on or after mid-1985 were *not* being carried by systems serving 52% of the cable subscribers in their ADI markets even on systems located within 35 miles of the stations' city of license. New educational stations were not being carried by systems serving 71% of the cable households in their ADI markets within 50 miles. And even new network affiliate stations were not being carried by systems serving 27% of the cable households in their ADI markets within 35 miles. DAE VOL. II.A, Meek Decl. at ¶ 19.

5. Even with respect to the study he does address, the drops analysis, Dr. Besen misanalyzes the focus of this study, and then makes significant errors in his reanalysis of the data. The drop study was undertaken primarily for three reasons. *See* DAE VOL. II.A, Meek Decl. at

¶¶ 3-5. First, as I explained in my first declaration, this study was undertaken in order to test whether the 1988 FCC Survey had overestimated (or underestimated) the scope of the problem, because of that study's discussion in both the Congressional Record and the earlier *Turner* very explicitly used the parameters adopted by the FCC Survey. Specifically, it used the pre-*Quincy* definition of a local broadcast station, and looked at drops of all stations that were carried under the pre-*Quincy* rules. Second, because the Cable Data information provides semi-annual carriage information (in contrast to the data Besen analyzed) it provided a very effective means to address one of the questions posed by the Supreme Court —the duration of drops. Third, for the same reason, the Cable Data information provides a method to ascertain trends (whereas Besen simply takes a "snap shot" at a given time and only of a sample, not of the entire universe of broadcast stations and cable systems).

6. The drop study produced important data on each of these issues. It indicated that the FCC study was actually quite conservative; if it had looked at the entire universe of cable systems and broadcast stations, and received contemporaneous carriage information (rather than information that in some cases could be years after the information that in some cases could be years after the fact), it would have discovered that the number of local broadcast stations dropped by cable systems was much higher than the FCC had documented. Furthermore, the 46.3 million drop figure for mid-1992 represents only *net adjusted* drop instances. The *gross* number instances in which stations were dropped for one year or more by 1992 is 50 percent higher. Finally, the data indicates that the cumulative and net impact of this problem grew steadily worse until Congress enacted must carry requirements in 1992.

7. Plaintiffs fundamentally mischaracterize the drops analysis by cable systems from 1985 to 1992 by treating

it as a study of non-carriage. As the study makes very clear, the figures reported therein do not include the large universe of instances where broadcast stations were simply refused carriage. Thus, to the extent Besen or plaintiffs mean to imply that this data provides any support for the conclusion that "most of the stations that would qualify for must carry were carried even in the absence of must carry" or "that instances of non-carriage were relatively rare," Besen Second Decl. at 14, this is a misuse of the drop study. The more relevant analysis would be the noncarriage study and, in particular the study analyzing noncarriage of new stations (which, as I note, Bessen does not comment on).

8. Indeed, Besen's own analysis confirms that by 1992, noncarriage was pervasive. According to the figures favored by Besen, instances of non-carriage for *all* broadcast stations was 22 percent in 1992 and instances of non-carriage of all UHF independents was at least 39 percent—even after "home shopping" and "miscellaneous" stations were excluded. DAE VOL. VIII, Exh. F, Besen Aff., Exh. 2-4. And, NCTA has acknowledged that Besen has actually identified a range of noncarriage that is between 19% and 31%, depending, among other things, on how restrictive a definition of "local" is employed.[1]

9. Besen's other criticisms of the drops study, and his attempt to reanalyze the data, contain significant mistakes. Thus, Besen reports that "Mr. Meek's own data show that over two-thirds of the instances of 'drops' remained after the must carry requirements were imposed" and he concludes that "these uncured drops should be subtracted . . . from the analysis because they are not protected by the must carry requirements." Besen Second Decl. at ¶ 12. In Besen's view, these stations should not be counted as drops.

[1] Memorandum of NCTA, Inc. in Response to Defendants' Motions for Summary Judgment at 24 n.4 (June 16, 1995).

10. This analysis is mistaken in two respects. First, for purposes of determining whether the FCC study underestimated or overestimated the problem it was measuring, it is perfectly appropriate to measure drops using the definition employed by the FCC (i.e., stations entitled to carriage prior to *Quincy*). As I have explained, this methodology supports conclusions about the extent to which the information reported to FCC was accurate, the duration of drops, and the trends—which are all relevant to the issues before Congress.

11. Further, any accurate measurement of the instances of drops as of 1992 must include all stations dropped as of that time, not as Besen would have it, instances of drops as of 1992 *less* the number of stations reported as dropped in 1994. Besen's basis for this arbitrary subtraction—the conjecture that stations not carried in 1994 were also not carried in 1992 but were ineligible for must-carry—is unsupported and insupportable. Many of the stations listed as drops in 1994 were network affiliates that were carried in 1992 but were dropped afterward because the cable ssytem was already carrying another affiliate in the same market area. Others were stations that were eligible for must-carry but have encountered lack of cooperation from cable systems or have yet to be added for a variety of other reasons. And some were stations eligible for must-carry that were not carried because the particular cable system had already met its must-carry obligation.[2] Under none of these circumstances would Besen be justified to subtract 1994 drops from the 1992 figure as a means of determining the total number of drops as of 1992.

[2] I have recently had the opportunity to review many additional documents provided by PBS which further confirm my understanding that numerous educational stations have encountered considerable difficulty in obtaining carriage due to non-complying signal measurement practices by cable systems. The data also confirms that numerous educational stations have been and continue to be added after June 1994.

12. Similarly, in attempting to calculate "the universe selecting a sample skewed, for other reasons entirely of possible drop instances" Besen has also misanalyzed the available data. Besen has calculated this figure by selecting a sample skewed, for other reasons entirely, to reflect the largest MSOs. Thus, his figure of 11 stations per system does not reflect, as he claims, the *average* number of stations per ssytem; it reflects the average number in a *small sample of very large MSOs*, as Dr. Peterman explained in the report in which Besen found this number.[3]

13. Had Besen looked at the figures produced by the same of plaintiffs' expert Dr. Shapiro he would have reported a ratio of drops alone—not including instances of non-carriage—almost six times higher that the figure he proposed. Indeed, Besen's decision not to use Shapiro's findings is curious, both because Shapiro purported to report information for a typical cable system, and because Besen has extensively relied on Shapiro's data base for other purposes. Had he done so here, he would have discovered that, prior to the Cable Act, "cable systems carried . . . on average 6 broadcast stations," DAE VOL. II.A., Shooshan Decl., Exh. B at 16 (Shapiro Must-Carry Report).

14. Alternatively, had Besen undertaken to calculate the average number of stations carried per system, or the average number of stations carried per system, weighted by subscriber sizes. he would have reported very different results. From a report produced by Cable Data Corporation, part of which was introduced by plaintiffs at my deposition as Exhibit 12, I have been able to derive both figures, based on the universe of systems rather than a skewed sample. The average number of stations carried per system in 1992 was 5.7; and the average number of

[3] The GAO figures Besen cites as corroboration are from 1989, not 1992, and are provided above a disclaimer admitting to "sampling errors."

stations carried per system in 1992, weighted by subscriber size, was 8.0. Reproducing the calculation Besen performed with these more accurate figures, yields the following: the ratio of drops alone—not including instances of non-carriage—was 10¼ percent, based on the weighted average number of stations, or almost 14½ percent based on a simple average.[4]

15. Besen's vague dismissal of the Cable Data Corporation data I used ignores the following: (1) this data remains the only comprehensive historical source of information on carriage of broadcast stations on essentially every cable system in the United States; (2) this data is required to be accurately reported by every cable system in the United States every six months *by federal law*; (3) this data permits an examination of nationwide trends over the ten-year period from before *Quincy* through today; and (4) this data has long been used to track carriage of broadcast stations by both the broadcasting and cable industries. Thus, the Cable Data Corporation data permits a overview of carriage not possible from samples, which cannot match its scope of accuracy.

Subscriber Interest in Alternatives to Must-Carry Stations

16. A relatively small number of cable programmers garner most of the ratings received by basic cable services. McLaughlin testified that as few as 10 cable services generate 90 percent or more of all cable ratings. Those 10 or so services have already achieved a very high percentage of penetration. The remainder of the approximately 128 national cable services, both ad-supported and non-ad-supported, enjoy compartively small audiences. The average ratings of *all* cable program services—including the 10 most popular—is probably more on the order of .15. It is not possible to provide an exact number

[4] The ratio is calculated as follows:

$$\frac{\textit{number of drops as of 1992 (46,300,000)}}{\text{total subscribers (56,500,000)} \times \text{no. stations per subscriber.}}$$

because many national cable services do not even have reported ratings.

17. Besen's analysis, which purports to compare the ratings of broadcast stations not carried in 1992 with the ratings of other broadcast stations obscures the real issue. The ratings analysis most relevant to demonstrating cable subscribers' comparative interest in must-carry broadcast stations versus available cable programming is a comparison of added local broadcast stations since 1992 and the ratings of other cable services carried in the same market. If cable systems, as Besen suggests, refused to carry certain local broadcast stations because of their subscribers' preferences for cable services that were carried in place of these stations, one would expect *all* cable programming services carried on such systems to have ratings exceeding those of the broadcast stations that were not carried. This is clearly not the case.

18. The broadcast stations added to cable systems as a result of must-carry appear to have ratings that are greater than or equal to the ratings of many other cable programming services carried by those systems. To demonstrate, I have undertaken a study using the Arthur D. Little ("ADL") sample. Althotugh I prefer to study the entire universe of added stations and cable systems, to avoid potential sample bias, the time constraints involved have precluded this. From the ADL sample, I prepared charts providing information about the ratings for cable services carried by the cable systems serving the 15 metered markets discussed in my earlier work. These charts also included the ratings in cablehouses of local broadcast stations added to systems in these markets pursuant to must-carry, according to the ADL sample. The number of systems in the ADL sample is small and therefore tends to include must-carry stations that were added to many systems and fail to include stations added pursuant to must-carry to fewer systems.

19. Attorneys at the Department of Justice then compared these ratings on a system by system basis, using

cable line-ups provided by Nielsen for the systems included in the ADL sample in the 15 metered markets. It was therefore possible to determine, for each must-carry add, how many cable program services carried by the system had ratings that were equal to, or lower than, the ratings of the added broadcast station. This analysis was performed for all 59 ADL systems in the 15 metered markets that had added stations pursuant to must-carry.

20. On average, the highest-rated must-carry station added to each system had ratings that were greater than or equal to *15* basic cable program services already carried on the system. Moreover, even the lowest-rated stations added pursuant to must-carry had ratings that were better than or equal to *nine* basic cable program services carried on the system.[5]

21. In addition, I undertook another study of cable programming ratings by reviewing the ratings of cable program services in the 15 metered markets, using the "DMA Cable Household" charts that I previously prepared and submitted with my first declaration, DAE II.A., Meek Decl. Att. N, and also using Nielsen "M-30" reports, which are appended as Attachment A. The "DMA Cable Household" charts, which are derived from the Nielsen DMA Total Activity Report, show the November 1994 all-day ratings in local DMA *cable households* for both broadcast stations and cable program services. The "M-30" reports provide supplemental information about cable services with ratings too low for inclusion in the Nielsen DMA Total Activity Report, but which Nielsen reports as having some viewing in the market.[6]

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[5] Although not included in the analysis, the systems generally carried several additional pay cable services which generated equal or lower ratings than even the lowest-rated must-carry adds. These pay cable and particularly pay-per-view services use a significant number of channels on most ssytems in the ADL sample.

[6] The Nielsen "M-30s" show ratings and shares for total television households. Thus, I use them here solely to identify ratings

22. Under my supervision, attorneys at the Department of Justice tabulated the number of cable services in each market that had ratings Bensen would have deemed "unreportable"—*i.e.*, ratings that round down to zero rather than to .1 or above. *See* Bensen Decl. at 42.[7]

23. The study clearly demonstrates that a large number of cable services are carried that have ratings Besen considered "unreportable." Further, if one excludes the top 10 cable services in each market, in order to focus on cable services that might compete for channel space with must-carry stations, it is clear that the majority of these have "unreportable" ratings. Indeed, in the Houston market, after excluding the top 10 cable services, there were 38 cable services reported as carried in the market by Nielsen or the ADL sample. Of these, 27 (more than 70 percent) had "unreportable" ratings—*i.e.*, ratings that would round to zero. *However, the number of cable program services generally available in each market is much greater than those found in the relatively small ADL sample.* The chart appended at Attachment B shows the number of cable services carried in each market and the number of such services with "unreportable" ratings—if the top ten cable services are excluded. In the 15 metered markets, the average number of non-top ten cable services reported as carried per market was 42, of which 25 (60 percent) had "unreportable" ratings, as defined by Besen.

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for additional cable programming networks. I also focused on what Nielsen labels "Basic Cable" services as opposed to "Pay Cable" services.

[7] Networks listed in the DMA Total Activity Report as having a lower than 0.1 rating were counted. Then all stations listed in the "M-30"s as being carried in the market that were not listed in the DMA Total Activity Report were added. In addition, in each market there were a number of cable program services that were listed on the channel lineups of cable systems that did not appear on either the Nielsen DMA Total Activity Report or "M-30" reports. These cable services, as well, had audience levels insufficient to be included in either of the Nielsen reports.

Network Affiliates and Must-Carry

24. Plaintiffs have also pointed to "illustrative" network affiliates that have allegedly used the must-carry provisions to "overreach," and claim that this shows that the provisions are overly inclusive. Plaintiffs' reliance on the mere mileage between a station's city of license and the cable system is misleading. An analysis of the specific circumstances of every station cited demonstrates that none of these stations was overreaching.[8] Moreover, to the extent that the cable systems identified by Time-Warner were unwilling to carry these broadcast stations, this contradicts plaintiffs' assertions that cable systems have carried, and will continue to carry, network affiliates that are highly watched in the systems' communities.

25. As a general matter, it is clear that the primary beneficiaries of the must-carry requirements have been smaller stations that are not affiliated with the major networks. This is widely recognized in the industry and is supported in the analysis of added stations that was submitted in my first declaration. DAE VOL. II.A., Meek Decl. at Exhs. R, S. All of the data I have reviewed in connection with this case is consistent with this conclusion. In addition, it is consistent with Besen's assertion that network affiliates have predominantly chosen retransmission consent.

26. There are, however, any number of reasons that in particular cases a network affiliate may request must-carry protection on a limited number of systems, while choosing retransmission consent on the others. In some cases, network affiliates have chosen must-carry protection in situations where this choice imposes no burden on the cable system involved. For example, under the FCC's rules, if a local network affiliate chooses retrans-

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[8] I also note with interest that plaintiffs, after criticizing the Cable Data Corporation reports that I used in many of my analyses have relied on them exclusively here.

mission consent because it has long been carried, and a more distant affiliate of the same network chooses must-carry, the cable system must choose the distant affiliate rather than the local one if it wishes to carry only one affiliate of that network. To potect against losing carriage and channel position, local affiliates in these circumstances may choose must-carry instead of retransmission consent. As a practical matter, this imposes no burden on the cable ssytem involved.

27. In addition, many small cable systems contacted broadcast stations in advance of the June 1993 must-carry deadline, informed those stations they were eligible for must-carry, and specifically asked them to elect must-carry, because the systems wished to carry the stations but were unable to provide compensation. Many stations, broadcast stations chose not to pursue compensation under retransmission consent from small systems, because the burden of negotiation on both parties was not justified.

28. Third, some network affiliates have chosen must-carry on dual-ADI cable systems. Because the stations eligible for must-carry are drawn from both ADIs in which such a system operates, there is a greater chance that the number of local stations eligible for must-carry will exceed the system's carriage obligation. Again, to protect carriage and channel position, even affiliates who have long been carried by such systems may choose must-carry.

29. For these and other reasons, it is a serious over-simplification for plaintiffs to simply identify more successful broadcast stations that have, for reasons plaintiffs do not explain, invoked must-carry protection and then assume that this reflects a material flaw in the must-carry provisions.

30. In fact, a careful analysis of the particular stations identified by plaintiffs as allegedly "overreaching" shows that each of these stations provided local service

to the community—both cable and non-cable; all are "reaching" within their own Area of Dominant Influence (ADI) only—*i.e.*, the counties in which these home market stations receive a preponderance of viewing—and most have been declared to be "significantly viewed" in the counties in question, qualifying despite the tougher standard historically applied to network affiliates. Indeed, many of these stations had undertaken exceptional measures to provide service to unserved or underserved rural communities, often at the apparent urging of those communities.

31. For example, Boston-licensed ABC affiliate WCVB is one of only two stations declared by the FCC as which is within WCVB's ADI. The other station declared "significantly viewed" is 129 miles away, more than 40 miles further than WCVB. In part due to the area's mountainous terrain, sheer distance and predicated Grade B contour are not always reliable indicators of which stations' signals Windham County's non-cable households can receive, nor which stations they prefer to watch. Thus, even though WCVB is some distance away, it had a 25-49 percent weekly circulation in Windham County in 1992 (1993 Warren TV and Cable Factbook)—despite being denied carriage on the Time-Warner cable system serving one-fourth of the county's television households. Using must-carry to obtain carriage on that system simply added cable carriage in an area in which WCVB was already significantly viewed in non-cable households.

32. Similarly, Minneapolis-licensed network affiliate KSTP (and its two satellites) had higher than 50 percent net weekly circulation in Chippewa County in 1992 (1993 Warren TV and Cable Factbook), which is within KSTP's ADI. It operated two full-power satellite stations to provide additional local service to Chippewa County well before must-carry was enacted. One of the satellites has been declared "significantly viewed" in the county by the FCC. Must-carry election by KSTP with

respect to the Time-Warner cable system in Chippewa County merely provided KSTP with access to cable households in a count yin which it was already providing significant services to non-cable households.

33. Another station identified by Time-Warner as "overreaching," KOCO in Oklahoma City, received a 25-49 percent net weekly circulation in Beckham County in 1992 (1993 Warren TV and Cable Factbook), which is within its ADI. By asking for must-carry from a cable system serving 14 percent of the households in that county, KOCO was simply adding cable households in Beckham to its considerable non-cable household audience. KOCO also elected must-carry on another system within its ADI, cited by Time-Warner, that serves more than half the households in Harmon County, in order to remain competitive with the two other network affiliates in Oklahoma City who were carried by that system. Although the cable ssytem receives the signals of those other affiliates by microwave, KOCO's signal is available off-air —including by means of a local translator that supplies KOCO's signal to both non-cable and cable households.

34. The final station identified by Time-Warner, Albuquerque-licensed network affiliate KOAT, has for some time reached out to provide local service to rural areas within its ADI that, absent the efforts of stations like KOAT to reach them, would often have little or no television service. The licensee of the Penasco translator used by KOAT is listed as the Penasco Social Action Committee, suggesting that KOAT provides service to the community at the express invitation of the area's residents. KOAT has been declared "significantly viewed" in Taos County by the FCC and registered a net weekly circulation higher than 50 percent in 1992 (1993 Warren TV and Cable Factbook). KOAT has also been declared "significantly viewed" in Otero County by the FCC and registered a net weekly circulation higher than 50 percent in 1992 (1993 Warren TV and Cable Factbook). By electing must-carry on those cable systems cited by Time-Warner that serve households in Otero and Taos Counties, KOAT simply ensured its access to cable households in counties where it already served non-cable households. Including KOAT, each system carries only three local commercial broadcast stations. Further, the system in Otero County has chosen to leave 28 of its available channels unused, according to Nielsen's CODE system.

The cable system in Pagosa Springs, Colorado, on which KOAT chose must-carry, had previously chosen to *import* Denver stations *by satellite* rather than carry any Albuquerque television stations, even though Pagosa Springs was within the Albuquerque ADI and Albuquesque stations were historically the dominant stations in the area. KOAT had a 25-49 percent net weekly circulation in the county which includes Pagosa Springs in 1992 (1993 Warren TV and Cable Factbook), despite its being denied carriage by the cable system serving half the county's television households. The translators that carry the signals of KOAT and other Albuquerque stations are licensed to the Pagosa Springs TV Association. Another translator, owned by the University of New Mexico and the Albuquerque Board of Education, ensures that Pagosa Springs receives the signal of the Albuquerque PBS station. No stations licensed to Denver maintain translators in Pagosa Springs. The system on which KOAT elected must-carry carries only three local commercial broadcast stations and has chosen not to use six other available channels.

Besen's Use of Diary Reported Ratings Figures

35. Besen uses diary ratings even in those markets which are metered, and which use metered data for nearly all sales and analysis purposes. It is well-known in the industry, however, that ratings, particularly for independent stations, are generally reported as higher by meters

than by diaries. For example, in the four markets to which Nielsen has added metered reporting in the past two years, every independent and PBS station had higher ratings and/or cumes when measured by meter. One dramatic example, WBNX in Akron, jumped 350 percent in ratings and 206 percent in total TV household cume.[9]

36. Research provided by the Association of Independent Television Stations, Inc., examining the impact of household meters introduced between 1990 and 1994 on ratings and shares shows that independents generally receive higher shares and ratings with metered reporting than with diary reporting. For example, in the morning daypart, the ratings of the examined non-Fox independents, on average, were 1.5 in their first metered book, and in the afternoon daypart, 2.4, and in the late night (or late fringe) slot, 2.8—all double or more than double the ratings reported by the diary method in the previous year. *See* Attachment C.

Further Weaknesses in Plaintiffs' Analyses

37. Plaintiffs' continued support of pre-*Century* rules as an alternative based on the permissibility of independent surveys ignores the practical barriers that rendered this option virtually a nullity. The surveys were required to meet very stringent requirements set by the FCC. A station historically had two companies to choose from: Arbitron, which is no longer in business, and Video Probe Index. It has been my experience that such surveys cost a minimum of $10,000 *per* county or community. Some ADIs include more than 50 counties. Thus, in the entire period during which pre-*Century* rules were in effect, comparatively few independent surveys were undertaken and accepted by the FCC.

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[9] The metered reporting period was post-must-carry and the comparison diary period pre-must-carry, which may also be reflected.

38. Besen's and McLaughlin's criticism of my using current subscriber figures to calculate the number of drop instances is misguided. When a station is denied carriage, it is denied access not only to those households that subscribe to cable at the time the station is dropped, but also to those additional households that become subscribers in subsequent years. To consider drop instances only at the time they first occur and only in terms of the number of cable subscribers at that point, as Besen and McLaughlin suggest, would badly understate the problem, because it ignores the inability of the station to reach the cable systems subscribers in subsequent years.

39. In contrast to McLaughlin's assumption that losing tenths of a ratings point is harmless to stations, the loss of even one-tenth of a ratings point has a substantial effect in the marketplace. For example, assuming advertising at $100 per ratings point per minute, loss of one-tenth of a ratings point would have the following effect on the revenues of hypothetical station KKWW:

Average Ratings — 1.0
Average $ Per 1 Ratings Point — $100 per Minute
Average $ Per .1 Ratings Point — $10 per Minute
Average Minutes For Sale Per Hour — 9
Average Sellout Rate — 75%
Number Of Hours Operating Per Day — 24
Number Of Days Per Year — 365

$1.0 \times \$100 \times 9 \times 75\% \times 24 \times 365 =$
$\$5,913,000$

Average Ratings — 0.9
Average $ Per 1 Ratings Point — $100 Per Minute
Average $ Per .1 Ratings Point — $10 Per Minute
Average Minutes For Sale Per Hour — 9
Average Sellout Rate — 75%
Number Of Hours Operating Per Day — 24
Number Of Days Per Year — 365

$0.9 \times \$100 \times 9 \times 75\% \times 24 \times 365 =$
$\$5,321,700$

Lost Revenue per loss of .1 rating point — $591,300

40. The simple, but serious, loss illustrated above would in many cases be aggravated by a variety of factors. Measurable ratings declines in individual programs would tend to be concentrated in programs with the highest ratings, which also tend to have a higher cost per point and a higher average sell-out rate. In a diary market, loss of tenths of a ratings point will often be reflected as a whole ratings point. Ratings losses may also cause programs to fall below minimum buyer ratings thresholds. Moreover, the revenue is almost exclusively lost from profits because the station's investment in equipment, programming, and other operating costs have already been made.

41. In addition, loss of cumes, which Besen and McLaughlin accord little weight, can reflect a very significant impact, especially on the hundreds of independent, educational, religious, specialty, and home shopping stations that rely on cumes and/or potential reach more than on ratings for revenues.

42. McLaughlin's analysis of ratings and cume gains is fundamentally flawed. McLaughlin's methodology evaluates such gains as if each station received 100 percent of all available viewers. Thus, under McLaughlin's methodology, a station with ratings that move from 1.0 to 2.0 should expect an increase in potential revenues of 1 percent. In fact, however, the revenues for such a station would more likely double (an increase of 100 percent). Interestingly, when McLaughlin analyzes ratings and cume losses, she adopts the correct—but inconsistent—methodology. *See* McLaughlin Second Decl. Ex. B, Table 4.

43. McLaughlin inexplicably underestimates the importance of advertising revenues to cable systems when her own figures make clear that such revenues, especially where MSOs have acquired clusters of systems, are extremely high. Thus, she reports advertising billings for the Time-Warner cluster in the Orlando area as $13.5 million—higher than all but four of the network affiliates in that market. Further, unlike the advertising revenues of the network broadcast stations, virtually all of that $13.5 million is derived from local advertising sources, which may well place it ahead of *all but the two* strongest Orlando network affiliates with respect to revenues from local sources.

44. Besen's dismissal of vertical integration as an incentive for cable systems to deny carriage to broadcast stations ignores the history of large MSO's using their far-reaching systems to launch new cable programming services in which they have an equity interest. Vertical integration has played a key role in the success of cable program services such as American Movie Classics and The Discovery Channel, in which TCI has equity interests. These cable networks were launched on TCI systems nationwide in the late 1980s, often displacing similarly-programmed independent and PBS broadcast stations from historical channel positions in order to maximize the cable services' exposure. TCI targeted independent stations again in 1991 when it launched Encore, a programming service which TCI created and owned. Encore, which carries movies from the 1960s, 1970s, and 1980s, was targeted at the same audiences historically served by traditional independent stations. It was launched on virtually every TCI system in April 1991, on a nearly universal position of channel 14. TCI dropped broadcast stations to make room for Encore where necessary. After more than four years, TCI carried Encore on 91 percent of its systems, reaching 94 percent of its subscribers. Encore's penetration into non-TCI cable households has been far less successful. Encore' penetration is less than 10 percent of the other nine larget MSOs. On average, these other nine MSOs carry Encore on only 13 percent of their systems, reaching 17 percent of their subscribers.

The remaining cable systems carry Encore on only 8 percent of their systems, reaching 23 percent of their subscribers. *See* Attachment D. Interestingly, the one Top 10 MSO that does not carry Encore at all, Viacom Cable, is the sole owner of a similar cable programming service, Flix. Likewise, *none* of TCI's more than 1,100 systems carries Flix, although Flix is available on 134 systems owned by other large MSOs.

June 29, 1995

/s/ Tom Meek
TOM MEEK

[Certification Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

APPENDIX TO PUBLIC BROADCASTER DEFENDANT-INTERVENORS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

* * * *

Dated: June 30, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

DECLARATION OF EDWARD J. COLTMAN

1. My name is Edward J. Coltman. Since 1989, I have been the director of the Policy Development and Planning staff of the Corporation for Public Broadcasting (CPB). In this position, I am responsible for supervising all aspects of CPB's research and strategic planning activities. From 1983 to 1988, I was deputy director of Policy Development and Planning at CPB. I hold the degree of Master of City and Regional Planning (with distinction) from the Harvard Graduate School of Design and the John F. Kennedy School of Government.

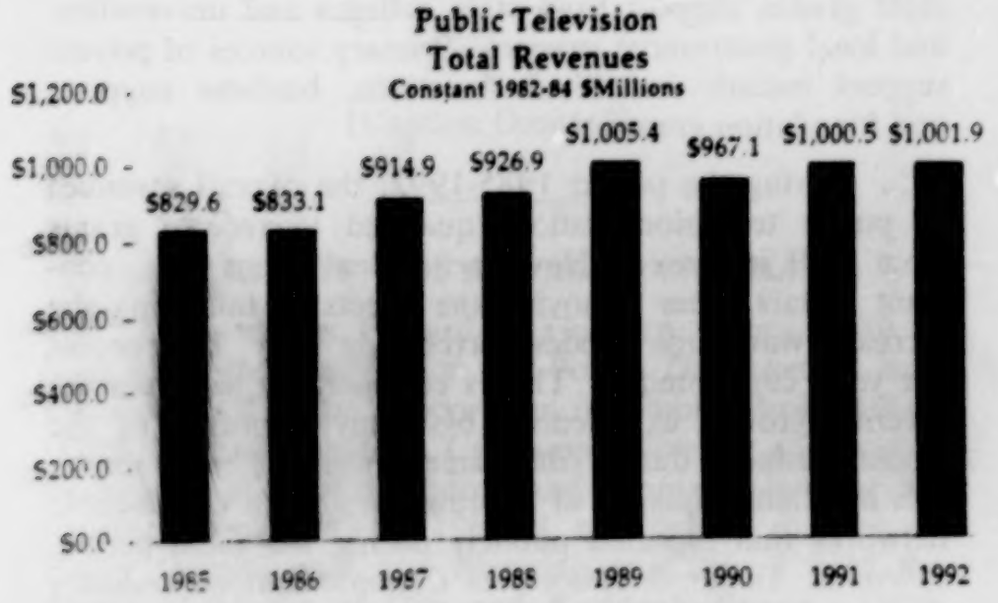
2. CPB is responsible for administering the funding appropriated by Congress for the support of public broadcasting, including both public television and public radio. CPB determines the eligibility of broadcast stations to receive these funds, allocates such funds through the grant process, and monitors the stations' use of grant funds. In connection withthese responsibilities, CPB receives detailed annual financial data from each station qualified to receive CPB grants.

3. Counsel for the public broadcasters have asked me to review CPB financial data in connection with several of the arguments made by the plaintiffs in this case. I am familiar with these data and use them regularly in the course of performing my duties.

4. Public television stations receive revenue from a number of sources. The major sources of tax-based support for public television stations are grants made by CPB, other federal grants and contracts, state government grants, support from state colleges and universities, and local government support. Primary sources of private support include individual donations, business support, and foundation grants.

5. During the period 1985-1992, the overall revenues of public television stations qualified to receive grants from CPB increased. However, in real terms (*i.e.*, constant dollars, after removing the effects of inflation) the increase was quite modest, averaging only 2.7 percent per year, compounded. This is considerably less than the revenue growth experienced by many segments of the media business during the same period. For example, it is less than a quarter of the revenue growth of the cable networks that reported publicly during the same period. (*Veronis, Suhler & Associates Communications Industry Report, 1985-1989* and *1988-1992*, November 1990 and November 1992.) In addition, the bulk of the increase occurred before 1989 and subsequently remained relatively flat in real terms. In fact, from 1988 through 1992, public television revenues rose less than two percent per year in constant-dollar terms—slightly more than one half of the rate that such revenues rose between 1985 and 1988 (3.8%). This is illustrated in Graph 1 below which shows total public television revenues in real terms (*i.e.*, expressed in constant dollars) for fiscal years 1985 to 1992:

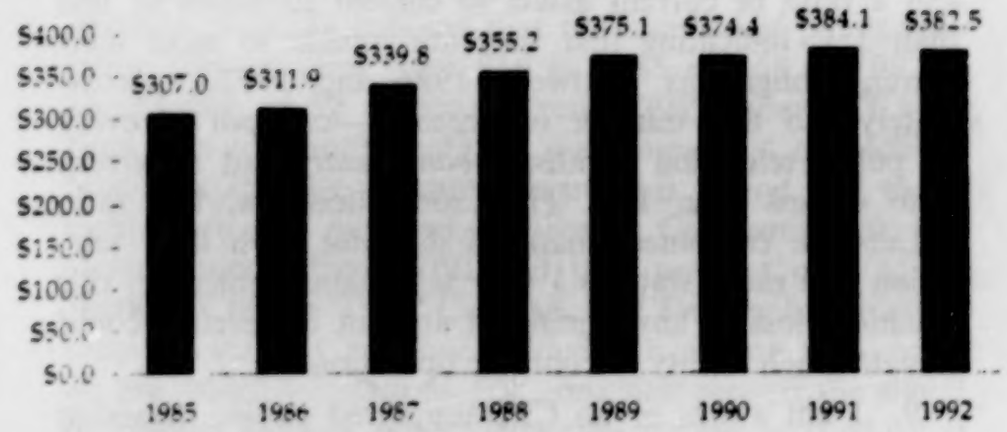
Graph 1



Source: Corporation for Public Broadcasting

6. During the 1985-1992 period, public television revenues from individual and business contributions increased. Again, however, most of the increase came in the period prior to 1989. In real terms, from 1988 to 1992, these revenues wer relatively flat. During this time they grew at a compound annual rate of less than two percent, which is less than half of the rate at which they grew between 1985 and 1988 (five percent). This is illustrated in Graph 2 below which shows public television revenues from individual and business contributions in real terms (*i.e.*, expressed in constant dollars) for fiscal years 1985 to 1992:

Graph 2



Source: Corporation for Public Broadcasting

7. The public television system could not reasonably be described as "financially healthy," either now or in 1992. Public television stations are nonprofit or governmental entities. Almost all are highly dependent on revenues from federal, state, or local governments to remain in business. If any substantial amount of government funding were withdraw from the system, it is likely that some number of stations would fail and most other stations would have to cut back on programming or other services. Loss of a substantial amount of private support (such as individual and business contributions) would have a similar effect.

8. As of 1992, a significant number of public television stations were at risk in financial terms. The excess of current assets over current liabilities is working capital, a dollar measure of an entity's ability to handle short-term obligations. The ratio of current assets to current liabilities, known as the "current ratio," is a commonly accepted indicator of financial viability. If this ratio is less than 1:1, the entity will have insufficient cash or other assets to meet its obligations that must be paid off within

one year. A ratio of 2:1 or greater typically indicates a sound financial condition. CPB's rata indicate that in fiscal year 1992, more than 16 percent of CPB-supported public television station licensees (or "television grantees") had a ratio of current assets to current liabilities of less than 1:1, indicating that they are unable to meet their current obligations. Between 1986 and 1992, approximately half that number of licensees—one out of every 12 public television grantees—*consistently* had a current ratio of less than 1:1. (For some licensees, this ratio reflects the combined financiali data for both their television and radio stations.) For television grantees in this situation, loss of any significant amount of revenue could threaten their ability to continue operations.

9. I am aware of no CPB-supported public television stations that have gone bankrupt or gone off-the-air since 1985. However, this does not mean that all stations were financially healthy during the 1985-1992 period. In that period, virtually all public television stations had some sort of financial "safety net" they could fall back on if they encountered financial difficulties (due to loss of private support or other reasons). Thus, a station that found itself in a precarious financial situation usually would have been able to turn to CPB or to a state or local government for additional support. Some stations are affiliated with colleges or universities or other institutional licensees that have an interest in helping them survive a financial crisis. In some cases, a station that otherwise would have gone dark survived by merging with a healthier station. Because of the existence of these various "safety nets," it is not surprising that public television stations have not gone dark, even in periods when they were experiencing serious financial difficulties. For stations in this situation, loss of any significant amount of revenues could threaten their ability to continue operations. I am aware of a number of public television stations that were in weak financial condition and did fall back on such "safety nets" during the 1985-1992 period.

10. I have been informed that plaintiffs argue that public television could not have been harmed by cable carriage difficulties because the number of public television stations increased during the 1985-1992 period. Apparently plaintiffs contend that the number of public television stations grew from 316 in 1985 to 368 in 1992—an increase of 52 stations. From CPB's records, I have been able to identify only 45 noncommercial educational broadcast stations activated during this period. Of these, eight were not qualified to receive Community Service Grant support from CPB and thus are not covered by Section 5 of the 1992 Cable Act. (This included seven religious stations and one student-run station.) Another 20 are "satellite" stations (*i.e.*, one that repeats the signal of another existing public television station with which it shares financial resources). A "satellite" station would have been added in an effort to extend the existing station's reach; it simply transmits the same signal to a broader area. Four other added stations were new services initiated by existing licensees, but none of these so-called "duopoly" stations constitute a true "new entrant." Another five of the new stations—while neither "satellite" nor "duopoly" stations—are licensed to state or local government entities, and thus are not as dependent on private support for their existence. Thus, in making a decision about activating a new station, only eight might have given much weight to the risks to their revenues from adverse cable carriage actions. The start-up decisions of the others would have been far more greatly influenced by unrelated factors. Accordingly, the figures for new entry during this period certainly are not indicators of a healthy public television system indifferent to the financial impact of adverse cable carriage actions.

* * * *

June 30, 1995

/s/ Edward J. Coltman
EDWARD J. COLTMAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

FEDERAL DEFENDANTS' STATEMENT IN RESPONSE TO THE COURT'S ORDER OF SEPTEMBER 7, 1995

By Order dated September 7, 1995, the Court requested the United States and the Federal Communications Commission ("federal defendants") to submit a brief statement clarifying the meaning of terms used in their memoranda in support of their summary judgment motion. The federal defendants respond to the Court's specific inquiries as follows, based on information provided by offices within the Federal Communications Commission.

FIRST INQUIRY

1. The federal defendants have stated that the number of *vacant UHF channels* increased between 1989 and 1991, *see* Memorandum of the United States and the Federal Communications Commission ("FCC") in support of their motion for summary judgment at 37 n. 81, but also that the number of UHF *stations* increased in the same epriod, *see* Corrected Memorandum of the United States and the Federal Communications Commission in Opposition to Plaintiffs' Motions for Summary Judgment, at 48.

(a) Has the universe of channels potentially available for broadcast television varied over the period analyzed?

RESPONSE: The amount of the radiofrequency spectrum that the FCC has allocated to television broadcasting did not change over the period analyzed. However, within the overall spectrum allocation, the FCC allots

specific channels to specific communities. *See* 47 C.F.R. § 73.606. The spectrum allocated for UHF broadcasting has not been saturated, *i.e.*, additional channels within the spectrum allocation can be allotted to communities and periodically are, resulting in increases in the number of allotted channels. For example, the total number of commercial UHF channels allotted increased between June 30, 1989 and December 31, 1991 from 945 to 957. *See Public Notice Television Channel Utilization* Table 2 (FCC, Sept. 7, 1989); *Public Notice Television Channel Utilization* Table 2 (FCC, March 12, 1992). *See also In the Matter of Amendment of Section 73.606(b)*, 3 FCC Rcd 4311 (MM Bur. 1988).

(b) How are the data on increasing vacant UHF channels and increasing UHF stations to be reconciled?

RESPONSE: The number of vacant UHF commercial channels increased at the same time new UHF commercial stations commenced operations primarily because of license applicants and/or construction permittees that abandoned their plans to operate broadcast television stations. The evidence is as follows:

The change in the number of vacant channels over a given time can be calculated as (a) the change in the number of allotted channels, less (b) the sum of (i) the change in the number of channels for which applications are pending but which have no existing licenses, (ii) the change in the number of construction permits, and (iii) the change in the number of stations.[1]

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[1] The number of vacant channels at a given tiem is the number of non-vacant channels subtracted from the total number of allotted channels. An allotted channel is considered non-vacant if either (i) an application is pending for a construction permit, (ii) a construc- issued for that channel. *See* Response Nos. 3(a), 3(b), and 3(b) tio permit has been granted, or (iii) a broadcast license has been [sic], below.

Thus, at any given time, the number of vacant channels is equal to (a) the total number of allotted channels, less (b) the sum of

Between June 30, 1989 and June 30, 1991 the total number of channels allotted for use by UHF commercial stations increased by 9, from 945 to 954. The number of channels for which there were pending applications for UHF commercial stations decreased by 14, from 55 to 41. The number of construction permits for UHF commercial stations decreased by 59, from 217 to 158. The number of licensed UHF commercial stations increased by 41, from 516 to 557. *Public Notice: Television Channel Utilization* Table 2 (FCC Sept. 7, 1989) (Exhibit A, attached hereto); *Public Notice: Television Channel Utilization* Table 2 (FCC Aug. 30, 1991) (Exhibit B).

In short, while the number of allotted UHF commercial channels increased by 9, the number of non-vacant UHF commercial channels *decreased* by 32 (41 more stations less 14 fewer applications less 59 fewer construction permits). As a result, the number of vacant UHF commercial channels increased during the period analyzed by 41, notwithstanding an increase of 47 in the number of UHF commercial stations. For the same reason, the proportion of vacant UHF channels increased from 16.6 percent as of June 30, 1989 to 20.8 percent as of June 30, 1991. *See Public Notice: Television Channel Utilization* Table 2 (FCC, Sept. 7, 1989) (showing 157/945 UHF channels vacant); *Public Notice: Television Channel Utilization* Table 2 (FCC, Aug. 30, 1991) (showing 198/954 UHF channels vacant).

Furthermore, *none* of the new vacancies during the period in question occurred because of a denial, revocation or refusal to renew a station's license.[2] Thus, all 32

(i) the number of channels for which there are pending applications but no licenses, (ii) the number of outstanding construction permits, and (iii) the number of licensed stations. The *change* in the number of vacant channels over time can therefore be derived, as stated in the text above, from the change in each of these figures.

[2] During the relevant period no *television* broadcast licenses or construction permits were revoked. *FCC Annual Report Fiscal Year 1991* at 37-39 (Exhibit C). Only two *television* (as opposed to radio) stations, KQUEC, and WSNS, were denied a license or license renewal. *Id.* at 38. KQEC was a non-commercial station, and therefore does not impact upon the number of UHF *commercial* vacancies. *See Letter to KQED, Inc.*, 6 FCC Rcd. 4384 (1991). In the same proceeding where the Commission denied renewal of WSNS's license, it also granted a construction permit to a competing applicant, resulting in no increase of vacant UHF commercial channels. *See In re Applications of Harriscope of Chicago, Inc.*, 5 FCC Rcd. 6383 (1990). During this period no television station voluntarily turned in its license.

new vacancies not attributable to increased channel allocations were the result of abandoned license applications and/or construction permits. These aborted plans to operate new broadcast stations principally explain why the number of vacant UHF commercial channels increased at the same time new commercial UHF stations came on the air.

(c) If the universe of channels potentially available to broadcast television has expanded over time, would the increase be consistent across all geographic areas, or are there other factors that might cause the FCC to limit the total number of potential broadcast stations permitted in particular areas?

RESPONSE: The FCC has allotted specific television channels to specific communities in rule making proceedings. *See* 47 C.F.R. § 73.606. The standards that govern the allotment of television channels are set forth generally in 47 U.S.C. § 307(b), which provides that the FCC "shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same." More specific standards were articulated by the FCC more than 40 years ago. *See Sixth Report and Order*, 41 F.C.C. 148, 167 (1952) (allotment priorities are (1) to provide at least one television service to all parts of the United States; (2) to provide each community with at least one

television broadcast station; (3) to provide a choice of a least two television services to all parts of the United States; (4) to provide each community with at least two television broadcast stations; (5) any channels which remained unassigned under the foregoing priorities will be assigned to the various communities depending on the size of the population of each community, the geographical location of such community, and the number of television services available to such community from television stations located in other communities). These standards remain applicable. *See In the Matter of Amendment of Section 73.606(b)*, FCC 95-266 (June 27, 1995).

(d) What databases do the federal defendants maintain of the number of "vacant" and "non-vacant" channels extant over time?

RESPONSE: The FCC maintains a computer database from which the *current* numbers of "vacant" and "non-vacant" stations can be ascertained. Other than the Public Notices regarding television channel utilization, cited above, the FCC has no consolidated database that would permit determination of "vacant" and "non-vacant" channels on a historical basis. These notices, which are released twice a year, provide the necessary data for June 30 and December 31 of each year for at least the last ten years, but do not answer the question for any other date.

It would be theoretically possible to examine hard copies of individual license files to determine when particular channels were "vacant" and "non-vacant" over time, but as a practical matter this would be an extremely time-consuming task, in view of the approximately 1,000 alloted UHF commercial channels whose files would have to be examined.

SECOND INQUIRY

2. (a) If a station has "ceased operating," does the license *ipso facto* terminate or may the firm holding the license retain it for any period of time? (b) If the

license-holder is able to retain the license at all, what terms govern its retention?

RESPONSE: A television station license does not terminate *ipso facto* when a station ceases operations. A license extends for a term of five years and remains in effect during that term unless the Commission acts to revoke the license. 47 U.S.C. § 307(c); 47 C.F.R. § 73.1020. Willful or repeated failure to comply with the minimum operating schedule established in the agency's rules (47 C.F.R. § 73.1740) would be ground for revocation of a license or denial or renewal. 47 U.S.C. § 312(a)(4), 308, 309; *see Video Marking Network, Inc.*, 10 FCC Rcd 7611 (MM Bur. 1995); *Cavan Communications*, 10 FCC Rcd 2873 (ALJ 1995). However, the Commission will permit stations to remain dark, sometimes for extended periods, upon an adequately supported request filed pursuant to 47 U.S.C. § 73.1740, which ordinarily involves financial hardship. *See Implementation of Section 9 of the Communications Act*, 60 Fed. Reg. 34901 ¶ 15 (July 5, 1995).

(c) Can the license-holder under these circumstances sell or transfer the license to another firm?

RESPONSE: A licensee may assign or transfer control of a television station license, pursuant to 47 U.S.C. §§ 309 and 310, only upon approval of the FCC based upon a finding that the public interest will be served by such a grant. FCC policy, however, precludes the assignment or transfer of a "bare license" unconnected to any physical facilities. *See MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1263 n.15 (D.C. Cir. 1968); *American Music Radio*, FCC 95-320 (Aug. 16, 1995).

If the licensee has complied with the requirements of 47 C.F.R. § 73.1740 regarding procedures for temporarily discontinuing operations, the fact that the station has "gone dark" would not necessarily affect an application for FCC consent to assignment or transfer. *See Video*

Marketing Network, Inc., 10 FCC Rcd 7611 (MM Bur. 1995). A licensee's failure to comply with the Commission's rules, such as 47 C.F.R. § 73.1740, could raise a question whether the public interest would be served by FCC consent to the assignment or transfer of the license in question.

If a renewal or revocation hearing has been instituted with respect to a licensee's failure to comply with agency rules, the Commission ordinarily will not permit assignment or transfer of a license unless the revocation or renewal proceeding is resolved favorably to the licensee. *See Coalition for the Preservation of Hispanic Broadcasting v. FCC*, 893 F.2d 1349, 1351, 1359 (D.C. Cir. 1990), *vacated in part on other grounds*, 931 F.2d 73, *cert. denied*, 502 U.S. 907 (1991); *Jefferson Radio, Inc. v. FCC*, 340 F.2d 781 (D.C. Cir. 1964).

(d) If so, do the federal defendants have data on the prices at which such licenses have changed hands over the periods disputed by the parties? [3]

RESPONSE: For fiscal years 1985 through 1993, the FCC acted on 5571 applications to assign or transfer television station licenses. (1985—591; 1986—767; 1987—781; 1988—575; 1989—524; 1990—602; 1991—516; 1992—531; 1993—685. *See* FCC Annual Reports FY 1985-1993). Applicants are required to include as an exhibit to the application the contract of sale. Such contracts frequently include the sale price, but the FCC does not require that the sale price be reported. Other supporting documentation may incidentally include more detailed financial information regarding the transaction, but because such information is not required by the FCC, it would not be reported in any uniform, reliable manner.

[3] If the federal defendants have data on the prices at which *packages* of assets including such licenses change hands, do they have data (such as corporate balance sheets) indicating the value of the assets other than the licenses, thereby making evaluation of the license value possible by subtraction?

Because there is no requirement to report the sales price of assignments and transfer, the FCC does not specifically compile such data. In addition, so far as the FCC can determine, it has never attempted to compile "data on prices at which . . . licenses have changed hands" in the case of stations that have "ceased operating" at the time the application was filed. It would not be plausible to compile such data at this time because the relevant application does not require the licensee to report whether the station is operating at the time that the assignment or transfer application is filed. While that information may be voluntarily reported in exhibits accompanying an application, it would not be reported with any consistency.

In addition, any attempt years after the fact to determine whether a station was operating at the time when the licensee filed an assignment or transfer application would be extremely difficult and time consuming because of the thousands of application files that would have to be examined manually. Moreover, applications routinely are moved to a record storage center on an irregular basis after approximately five years and are either difficult or impossible to access, particularly in large numbers.

(e) Is "ceased operating" the same as a station "going dark?"

RESPONSE: Yes. "Going dark" is generally understood as a term of art indicating that a television broadcast station is no longer transmitting a signal. "Ceased operating" has been used in the government's pleadings in this case to convey the same meaning.

The government used the term "going dark" when discussing an analysis by Mr. Meek which shows that the number of stations "going dark" increased during the non-must carry period. *See* Memorandum of the United States and the Federal Communications Commission in Opposition to Plaintiffs' Motions for Summary Judgment, at 48-50, citing DAE Vol. II.A, Meek Decl., ¶¶ 76-82. Mr. Meek relied for his analysis on Exhibit K to his declara-

tion, a report by Warren Publishing of stations "off air," or that "left [the] air" since January 1, 1985. *Id.*, ¶ 74 & Exh. K. These terms can also be considered as equivalent to "ceased operating" and "going dark."

THIRD INQUIRY

3. (a) Under what circumstances is a channel terms [sic] "vacant?"

Response: Pursuant to rule-making proceedings, the FCC has allotted specific television channels to specific communities. *See* 47 C.F.R. § 73.606. A channel listed in the "Table of Allotments" set forth in that provision of the Commission's rules is deemed "vacant" if there are no applications pending for a construction permit and if the FCC has not issued a construction permit or license to permit construction or operation of a broadcast station on that channel pursuant to 47 U.S.C. §§ 307-309.

(b) Is a channel "vacant" when any of the following is the case: (i) a firm holds a license for the station but is not broadcasting; (ii) a firm has "forfeited" its license for the channel; and (iii) the Federal Communications Commission has provided for a channel but has not issued a license?

RESPONSE: (i) If a license has been issued, which has neither expired nor been revoked, the channel is not "vacant," regardless of whether the licensee is actually broadcasting on the channel at a given time.

(ii) There is no provision in the Communications Act or the FCC's regulations providing for "forfeiture" of a license, but once a license is issued, it can be revoked pursuant to the provisions of 47 U.S.C. § 312, or expire pursuant to the provisions of 47 U.S.C. 307 and 47 C.F.R. § 73.1020. Renewal can also be denied pursuant to the provisions of 47 U.S.C. §§ 308-309. Section 73.1750 of the Commission's Rules, 47 C.F.R. § 73.1750,

requires licensees to tender their license authorizations for cancellation when discontinuance of station operation is permanent. In such cases, the channel is and remains vacant unless and until a new application for construction permit is pending.

The Commission Act provides that a construction permit is "automatically forfeited" if the station is not constructed within the time permitted by the Commission. *See* 47 U.S.C. § 319(b); *MG-TV Broadcasting Co. v. FCC*, 408 F.2d 1257, 1261 (D.C. Cir. 1968) (holding that the FCC must, nevertheless "declare" a permit forfeited even where a station has not been constructed within the time permitted). In that case as well, the channel is and remains vacant unless and until a new application for construction permit is pending.

(iii) A television broadcast channel listed in the FCC's "Table of Allotments" (47 C.F.R. § 73.606) is considered "vacant" if there are no applications pending for a construction permit for the channel and if the Commission has issued neither a construction permit nor a license.

(b) [sic] What steps are necessary for a channel that is "vacant" to cease to be "vacant?"

RESPONSE: A "vacant" channel ceases to be vacant upon public notice of the acceptance for filing of an application(s) for a construction permit for the channel. The Communications Act requires the filing of a written application before the FCC may grant a construction permit or station license, 47 U.S.C. § 308, and requires the issuance of a construction permit prior to issuance of a television broadcast station license. 47 U.S.C. § 319.

(c) What does it mean to say that a broadcast station construction permit has been "forfeited?"

RESPONSE: *See* (b)(ii).

[Signature Block Omitted]

[Exhibit A]

[FCC Logo]

PUBLIC NOTICE

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September 7, 1989

TELEVISION CHANNEL UTILIZATION

The Commission has made available a report on Television Channel Utilization as of June 30, 1989.

This report shows by market, for commercial and non-commercial channels, the number of VHF and UHF channels licensed (LIC), the number for which construction permits have been granted (CP), the number for which an application has been filed (APP), the number for which an application has not been filed (VAC), the number of UHF channels allocated for television but reassigned for land mobile use, and the total number of channels allocated.

The markets numbered 1-210 are ranked by Aribtron ADI television households, 1982-83. Additional markets, numbered 211-225, are listed alphabetically; third group comprises the States of Alaska and Hawaii and the Territories or Commonwealths of Guam, Puerto Rico, the U.S. Virgin Islands, and the Northern Mariana Islands.

For each market the communities of allocation are shown. Where the communities of allocation and license are not the same, both communities are shown, with the community of license in parentheses.

An index to the markets and communities in the tabulation is provided. The communities shown are those in the FCC Rules and Regulations, Table of Assignments, Section 73.606, Amendments as of June 30, 1989.

The tabulation was prepared by the Policy And Rules Division of the Mass Media Bureau. Questions concerning the data may be addressed to that office at the FCC, Washington, D.C. 20554, or telephone Evelyn Ripka (202) 632-5414.

a/ The market designations are those used in Arbitron's 1982-1983 Television Markets and Rankings Guide. The markets numbered 1-210 are ranked by ADI television households. The markets in Alaska, Hawaii, Guam, Puerto Rico, the Virgin Islands, and Northern Mariana Islands are numbered 211-225.

b/ Excludes 19 UHF channels reassigned for land mobile use and not available until further FCC action.

c/ VHF and UHF channels allocated for commercial use but used by non-commercial educational stations are included with non-commercial channels. UHF channels reassigned for land mobile use and not available until further action by the Commission are excluded.

d/ May include stations licensed but not on the air.

e/ May include stations not licensed but on the air with program test authority.

f/ I. All communities in ADI.
II. Communities within 55 miles of ADI title city (according to the maps in Television Digest's Cable and Station Coverage Atlas).
III Communities within ADI but more than 55 miles from title city.

Table 1 Use of Television Channels Summarized as of June 30, 1989

Channel Status	Market Rank by ADI TV Households a/																	
	Markets 1-50						Markets 51-100						Markets 101-150					
	I b/		II b/		III b/		I		II		III		I		II		III	
	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
Commercial Channels Total Allocated c/	192	376	162	309	29	67	141	265	113	225	28	40	138	160	110	139	29	21
Licensed d/	171	231	161	210	10	21	131	139	110	129	21	10	118	84	106	78	12	6
Construction Permit e/	9	82	0	64	8	18	6	65	3	51	3	14	3	34	0	32	3	2
Applications Pending	2	23	0	17	2	6	1	18	0	13	1	5	3	8	3	6	0	2
Vacant	10	40	1	18	9	22	3	43	0	32	3	11	14	34	1	23	14	11
Non-Commercial Ed. Channels Total Allocated c/	41	216	33	134	8	82	35	178	20	116	15	62	30	104	23	70	7	34
Licensed d/	35	92	31	80	4	12	31	75	20	57	11	18	30	37	23	31	7	6
Construction Permit e/	3	13	2	11	1	2	0	6	0	6	0	0	0	4	0	4	0	0
Application Pending	0	1	0	1	0	0	0	1	0	1	0	0	0	1	0	1	0	0
Vacant	3	110	0	42	3	68	4	96	0	52	4	44	0	62	0	34	0	28
All Channels Total Allocated	233	592	195	443	37	149	176	443	133	341	43	102	168	264	133	209	36	55
Licensed d/	206	323	192	290	14	33	162	214	130	186	32	28	148	121	129	109	19	12
Construction Permit e/	12	95	2	75	9	20	6	71	3	57	3	14	3	38	0	36	3	2
Applications Pending	2	34	0	18	2	6	1	19	0	14	1	5	3	9	3	7	0	2
Vacant	13	150	1	60	12	90	7	139	0	84	7	55	14	96	1	57	14	39

Table 1 (cont'd) Use of Television Channels Summarized as of June 30, 1989

hannel Status	Market Ranks by ADI TV Households a/																	
	Market 151-200						Markets 201-225						Total Markets 1-225 b/					
	I e/		II e/		III e/		I		II		III		I		II		III	
	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
ommercial Channels																		
Total Allocated c/	97	93	79	87	18	11	57	46	46	40	11	6	625	945	511	800	114	145
Licensed d/	80	42	73	41	7	1	42	20	34	20	8	0	542	516	484	478	58	38
Construction Permit a/	7	20	1	19	6	1	2	16	1	13	1	3	27	217	6	179	21	38
Application Pending	3	3	2	3	1	0	0	3	0	3	0	0	9	55	5	42	4	13
Vacant	7	28	3	24	4	9	13	7	11	4	2	3	47	157	16	101	31	56
lon-commercial Ed. Channels																		
Total Allocated c/	19	71	14	57	5	14	20	25	17	18	3	7	145	594	107	395	38	199
Licensed d/	15	15	10	14	5	1	13	4	12	4	1	0	124	223	96	186	28	37
Construction Permit a/	0	3	0	3	0	0	0	1	0	1	0	0	3	27	2	25	1	2
Application Pending	0	0	0	0	0	0	0	0	0	0	0	0	0	3	0	3	0	0
Vacant	4	53	4	40	0	13	7	20	5	13	2	7	18	341	9	181	9	160
\11 Channels																		
Total Allocated	116	164	93	144	23	25	77	71	63	58	14	13	770	1534	618	1195	152	344
Licensed d/	95	57	83	55	12	2	55	24	46	24	9	0	666	739	580	664	86	75
Construction Permit a/	7	23	1	22	6	1	2	17	1	14	1	3	30	244	8	204	22	40
Applicant Pending	3	3	2	3	1	1	0	3	0	3	0	0	9	58	5	45	4	13
Vacant	11	81	7	64	4	21	20	27	16	17	4	10	65	493	25	282	40	216

[Exhibit B]

[FCC Logo]

PUBLIC NOTICE
FEDERAL COMMUNICATIONS COMMISSION
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August 30, 1991

TELEVISION CHANNEL UTILIZATION

The Commission has made available a report on Television Channel Utilization as of June 30, 1991.

This report shows by market, for commercial and noncommercial channels, the number of VHF and UHF channels licensed (LIC), the number for which construction permits have been granted (CP), the number for which an application has been filed (APP), the number for which an application has not been filed (VAC), the number of UHF channels allocated for television but reassigned for land mobile use, and the total number of channels allocated.

The markets numbered 1-210 are ranked by Aribtron ADI television households, 1982-83. Additional markets, numbered 211-225, are listed alphabetically; third group comprises the States of Alaska and Hawaii and the Territories or Commonwealths of Guam, Puerto Rico, the U.S. Virgin Islands, and the Northern Mariana Islands.

For each market the communities of allocation are shown. Where the communities of allocation and license are not the same, both communities are shown, with the community of license in parentheses.

An index to the markets and communities in the tabulation is provided. The communities shown are those in the FCC Rules and Regulations, Table of Assignments, Section 73.606, Amendments as of June 30, 1989.

The tabulation was prepared by the Policy And Rules Division of the Mass Media Bureau. Questions concerning the data may be addressed to that office at the FCC, Washington, D.C. 20554, or telephone Evelyn Ripka (202) 632-5414.

a/ The market designations are those used in Arbitron's 1982-1983 Television Markets and Rankings Guide. The markets numbered 1-210 are ranked by ADI television households. The markets in Alaska, Hawaii, Guam, Puerto Rico, the Virgin Islands, and Northern Mariana Islands are numbered 211-225.

b/ Excludes 19 UHF channels reassigned for land mobile use and not available until further FCC action.

c/ VHF and UHF channels allocated for commercial use but used by non-commercial educational stations are included with non-commercial channels. UHF channels reassigned for land mobile use and not available until further action by the Commission are excluded.

d/ May include stations licensed but not on the air.

e/ May include stations not licensed but on the air with program test authority.

f/ I. All communities in ADI.
II. Communities within 55 miles of ADI title city (according to the maps in Television Digest's Cable and Station Coverage Atlas).
III Communities within ADI but more than 55 miles from title city.

Table 1 Use of Television Channels Summarized as of June 30, 1991

Channel Status	Market Rank by ADI TV Households a/																	
	Markets 1-50						Markets 51-100						Markets 101-150					
	I f/		II f/		III f/		I		II		III		I		II		III	
	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
Commercial Channels																		
Total Allocated c/	192	377	163	310	29	67	141	265	113	225	28	40	137	164	110	140	27	24
Licensed d/	171	251	161	226	10	25	134	143	112	132	22	11	119	92	106	85	13	7
Construction Permit e/	9	64	1	50	8	14	2	54	1	41	1	13	1	23	1	21	0	2
Applications Pending	2	16	0	13	2	3	1	8	0	6	1	2	2	8	2	4	0	4
Vacant	10	46	1	21	9	25	4	60	0	46	4	14	15	41	1	30	14	11
Non-Commercial Ed. Channels																		
Total Allocated c/	41	217	32	135	9	82	35	178	20	115	15	63	30	106	23	71	7	35
Licensed d/	37	96	32	84	5	12	31	78	20	60	11	18	30	39	23	33	7	6
Construction Permit e/	1	8	0	7	1	1	0	5	0	5	0	0	0	1	0	1	0	0
Application Pending	0	3	0	2	0	1	0	3	0	1	0	2	0	1	0	1	0	0
Vacant	3	110	0	42	3	68	4	92	0	49	4	43	0	65	0	36	0	29
All Channels																		
Total Allocated	233	594	195	445	38	149	176	443	133	340	43	103	167	270	133	211	34	59
Licensed d/	208	347	193	310	15	37	165	221	13	192	33	29	149	131	129	118	20	13
Construction Permit e/	10	72	1	57	9	15	2	59	1	46	1	12	1	24	1	22	0	2
Applications Pending	2	19	0	15	2	4	1	11	0	7	1	4	2	9	2	5	0	4
Vacant	13	156	1	63	12	93	8	152	0	95	8	57	15	106	1	66	14	40

Table 1 (cont'd) Use of Television Channels Summarized as of June 30, 1991

Channel Status	Market Ranks by ADI TV Households a/																	
	Market 151-200						Markets 201-225						Total Markets 1-225 b/					
	I f/		II f/		III f/		I		II		III		I		II		III	
	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U	V	U
Commercial Channels																		
Total Allocated c/	97	102	79	91	18	11	57	46	46	40	11	6	624	954	511	806	113	148
Licensed d/	79	46	72	45	7	1	43	25	35	23	8	2	546	557	486	511	60	46
Construction Permit e/	9	8	3	8	6	0	0	9	0	8	0	1	21	158	6	128	15	30
Application Pending	2	6	0	6	2	0	1	3	1	3	0	0	8	41	3	32	5	9
Vacant	7	42	4	32	3	10	13	9	10	6	3	3	49	198	16	135	33	63
Non-commercial Ed. Channels																		
Total Allocated c/	19	72	14	58	5	14	21	25	18	18	3	7	146	598	107	397	39	201
Licensed d/	15	17	10	16	5	1	13	4	12	4	1	0	126	254	97	197	29	37
Construction Permit e/	0	1	0	1	0	0	0	1	0	1	0	0	1	16	0	15	1	1
Application Pending	0	1	0	1	0	0	2	0	2	0	0	0	2	8	2	5	0	3
Vacant	4	53	4	40	0	13	6	20	4	13	2	7	17	340	8	180	9	160
All Channels																		
Total Allocated	116	174	93	149	23	25	78	71	64	58	14	13	770	1552	618	1203	152	349
Licensed d/	94	63	82	61	12	2	56	29	47	27	9	2	672	791	583	708	89	83
Construction Permit e/	9	9	3	9	6	0	0	10	0	9	0	1	22	174	6	143	16	31
Applicant Pending	2	7	0	7	2	0	3	3	3	3	0	0	10	49	5	37	5	12
Vacant	11	95	8	72	3	23	19	29	14	19	5	10	66	538	24	315	42	223

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Caption Omitted]

PLAINTIFFS' JOINT OBJECTION TO FEDERAL DEFENDANTS' STATEMENT

Plaintiffs jointly submit the following objections to the federal defendants' Statement in Response to the Court's Order of September 7, 1995.

The federal defendants have filed narrow, limited answers to the precise questions put by this Court in its Order of September 7, 1995. Plaintiffs agree that this case can and should be resolved without the submission of comprehensive evidentiary materials, or the holding of additional, time-consuming, adversarial proceedings, on these factual matters. Nevertheless, without some additional context, a skewed picture may emerge from the government's spare filing. Accordingly, plaintiffs submit this brief response to place the government's information in proper perspective and thus to forestall the drawing of any incorrect inferences from the highly limited data submitted by the government.

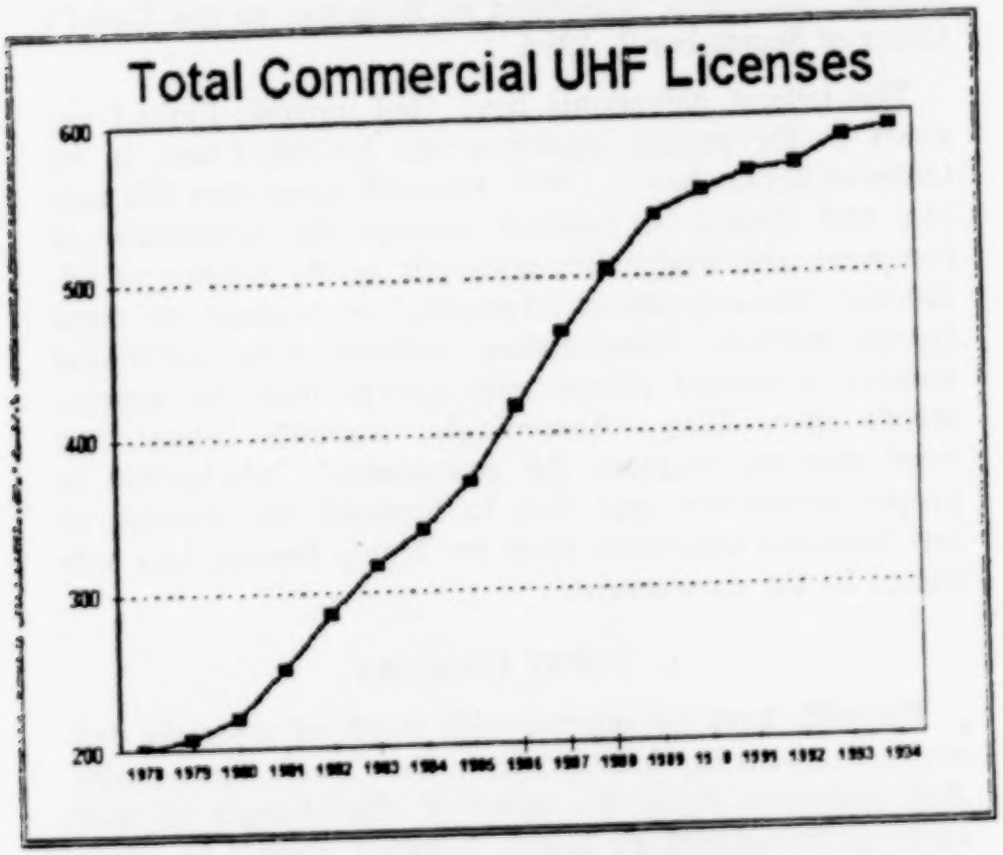
1. FIRST INQUIRY.

Plaintiffs have no quarrel with much of what the federal defendants say in response to the Court's first inquiry. Any inference about the effect of the absence of must carry on broadcasting's health, however, cannot be drawn based on the number of "vacant" channels.

The central fact that emerges from the FCC's statistics is that the number of licensed commercial UHF television

stations, as shown in Figure 1 (below), has increased steadily regardless of the presence or absence of must-carry. The number of such licenses increased rapidly during 1983-1989, before and after the elimination of must-carry rules. And the number of such licenses has increased (albeit more slowly) during 1990-1994, before and after the reimposition of mandatory carriage requirements. These facts alone suffice to show the persistent health of this segment of the commercial broadcast system, with or without must-carry.

Figure 1



The impossibility of drawing any inference from a narrow focus on "vacant" channels can best be understood in the context of the FCC's stewardship of channel allocations. In 1952, the FCC promulgated a national Table of Assignments, which allocated particular television channels in both the VHF and UHF portions of the spectrum. Those allocations were based on a combination of existing stations, pending applications, the FCC's expectations about future demand for television licenses and the policy of equal nationwide access to broadcast television. More than 2,000 VHF and UHF channel allocations were made in the 1952 Table of Assignments; many thousands of other potential channels remained unallocated (and remain so today). *See generally Sixth Report and Order* in Docket Nos. 8736 et al., 41 FCC 148 (1952).

Once a specific channel is assigned to a particular community, the license to that channel may be obtained by application to the FCC. Following a favorable decision on an application, the FCC issues a construction permit, authorizing the building of the station and the testing of the transmitter; once construction is complete and operations are satisfactory, a regular license is applied for and issued. *See generally* 47 C.F.R. §§ 73.3500-73.3536.

Until someone applies for a license for an allocated channel, a channel on the Table of Assignments is shown in the FCC's statistical reports as "vacant". The fact that a particular channel is "vacant" creates no inference about the health of the commercial broadcast system. A channel may be vacant for obvious economic reasons: for example, it may lie in the heart of an unpopulated region and may not have been the subject of a single license application since 1952.[1] On the other hand, there is continuing demand for channels that do not yet exist in the Table of Assignments, *e.g.*, in populous suburban areas. To obtain such a channel, a would-be applicant must peti-

[1] The process used by the FCC to arrive at the 1952 UHF allocations has been described as "scatter[ing] the remaining UHF station assignments over the hinterlands", largely without consideration of a community's ability to support the broadcast station(s) assigned to it. *See* Kohlmeier, *The Regulators* 205-08 (1969).

tion the FCC to amend the Table of Assignments via rule-making. Only after the Table is amended to add a new channel can an application for that channel be made. *See Report and Order in* BC Docket 82-320, 53 RR 2d 681, 683-84 (1983).

In short, the number of vacant channels is an artificial number, reflective more of the FCC's 1952 predictions than the present vibrancy of the broadcast industry. Many channels listed as "vacant" may be anachronisms that will never be occupied; elsewhere in the country, there may be intense demand for unallocated channels that do not show up in the FCC's statistics at all. The number of "vacant" channels is thus irrelevant to any inqury in this case. It is instead the number of *licensed* stations that is of key importance here.

The federal defendants state that an increase in the number of vacant commercial UHF channels justifies an inference that plans to operate new broadcast stations were "aborted". To the extent that the federal defendants' statement might be read to imply an abandonment of plans caused by the absence of must carry, there can be no justification for the inference.

The foregoing description of the process of license issuance and channel allocation places the federal defendants' statistics in perspective. For example, the federal defendants report that, from 1989 to 1991, the number of construction permits decreased by 59. However, the number of licenses actually increased by 41 during that period indicating that all but 18 permittees made the transition to full licenses. *See* Fed. Defs. Statement, Exs. A-B. The FCC does not regularly retain files relating to construction permits for more than six months; accordingly, we do not know why each of those 18 permittees did not achieve licensed status. However, anecdotal evidence as to some of the 18 unsuccessful permittees suggests that factors such as a station's failure to pay state

employment taxes and a consequent state order to cease doing business (KFNB), a station's failure to file either a license application or a construction permit extension application after the expiry of its construction permit (WJAE), or a station's failure to seek or obtain local zoning approval (WROZ), led to their demise—factors obviously unrelated to the must-carry rules or the health of broadcasting generally.[2]

Finally, the limited two-year period focused on by the federal defendants (June 1989 to June 1991) was an atypically difficult time for broadcast industry expansion, for reasons unrelated to must carry. As the broadcast industry entered 1989, a freeze on new applications in the 25 largest markets had already been imposed by the FCC to provide time for the study of advanced television technologies. *Order* in RM-5811, 1987 FCC LEXIS 3477 (1987). If a new application was filed, it was simply returned by the FCC, and thus never appeared in the FCC's statistics as a "pending application." *Id.* The FCC also adopted a new "get tough" approach on the extension of construction permits in the 1980s, resulting in a decline of outstanding permits from that point forward.[3] Added to those pressures on license applications and construction permits was the 1990-91 economic recession, which saw the broadcast industry's attractiveness to investors diminish sharply—a depressant from which construction permits and license applications had not fully recovered by June 1991, the end of the federal defendants' two-year

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[2] This anecdotal evidence is available at the FCC in the files pertaining to the cited stations. We mention it to indicate the unjustifiability of any inference based on the vacancy numbers.

[3] The FCC first promulgated its "get tough" policy in 1981, but appears to have begun its strict enforcement in 1984. *See Memorandum Opinion and Order* in File No. BMPCT-840524KF, 1985 FCC LEXIS 3427, *7 (1985) (14 construction permits cancelled in 1984 for failure to construct in the time allotted).

statistical window.[4] In view of those roadblocks, it is no surprise that the number of applications and construction permits fell between 1989 and 1991. Despite those factors, the number of licensed stations steadily increased.

II. SECOND INQUIRY.

Several of the federal defendants' responses to Question a warrant supplementation.

Regarding Question 2(b), the important fact is that the licensee of a station that has ceased operating must continue to comply with the same FCC rules that govern the operation of broadcast facilities generally.[5] This includes the requirement that the licensee of a silent station tender its license to the Commission for cancellation when discontinuance of station operations becomes permanent. *See* 47 C.F.R. § 73.1750. As defendants have acknowledged, however, during the three-year period preceding adoption of the 1992 must-carry provisions, not a single television station voluntarily turned in its license. *See* Fed. Defs. Statement at 4, n.2.

The fact that stations rarely if ever voluntarily surrender their licenses also shows—with respect to Question 2(d)—that a broadcast license has considerable value even though a station may have ceased broadcasting. Al-

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[4] For example, the National Association of Broadcasters reported that "[b]y 1991, the economics of the industry had changed dramatically", and attributed that change to, *inter alia*, "the profound national recession", "the impact of the Gulf War" and its downward impact on advertising revenues because of "substantial program preemptions", and "restrictions on the borrowing capacity of broadcasters". Dep. Ex. TWL 7 at 5002992; *see also* Goodman Dep. 179-81.

[5] *See, e.g.*, 47 C.F.R. §§ 73.1125 (Main Studio); 73.1213 (Antenna Structure, Marking and Lighting); 73.3612 (Annual Employment Report); 73.3613 (Filing of Contracts); 73.3615 (Ownership Reports); 73.3526 (Public Inspection File); and 73.3539 (Applications for License Renewal).

though the federal defendants state that they have in hand no data concerning the prices at which silent stations (or their licenses) changed ownership during the period at issue, information about sale prices is available from various industry sources. For instance, materials published by Paul Kagan Associates, Inc., a source of data about the cable and broadcast television industries that the parties have stipulated is "widely respected", provide detailed information about the values for television license sales transactions proposed or consummated from 1985 through 1994. *See Kagan's TV Deal Record 1995* (Paul Kagan Associates, Inc. 1995 ed.); Jt. St. Undisputed Facts ¶ 109. Warren Publishing's *TV & Cable Factbook* also provides detailed information about the ownership and operational status of television stations during the period at issue. *See TV & Cable Factbook* (Warren Publishing 1995 ed.) Stations Vol. 63. Finally, defendants' expert Mr. Meek has identified 31 commercial television stations that purportedly left the air for some time during the period in dispute. *See* Meek Decl., ¶ 74 and Exh. K.[6] By cross-indexing Meek's list of silent stations with the Kagan and Warren Publishing materials, it is possible to ascertain the prices at which silent stations changed hands during the period in question. That information makes clear the limited point worth making here: the licenses of silent stations have real value.

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[6] Although Mr. Meek asserts that these stations left the air during the period between 1985 and 1994, he does not suggest that any of the stations ceased operating as a result of adverse cable operator conduct. Indeed, of the 142 commercial stations identified in defendants' opening papers, plaintiffs have identified only 15 that actually left the air allegedly because of cable operator conduct—and plaintiffs have thoroughly rebutted the insinuation of wide-ranging anticompetitive conduct by cable operators. *See* TWE Broadcast Station Rebuttal. Significantly, not a single public television station went dark during the eight-year period spanning 1985 through 1992. *See* Brugger Dep. 167 (TW 5/26/95 Corr. App. Ex. 10).

An example illustrates the point. Mr. Meek testified that WHRC left the air in the spring of 1990. *See* Meek Decl. ¶ 74 and Exh. K at 2. At that time, the station was one of approximately 14 commercial television stations operating in the Boston ADI. *See TV & Cable Factbook* (Warren Publishing 1990 ed.) at A-550. Kagan reports that *after* the time the station went silent, an application was filed with the FCC (in January 1991) seeking to transfer control of the station's license for $4.25 million—real value indeed. *See Kagan's TV Deal Record 1995* at 71.

Plaintiffs assume that the Kagan and Warren data reflect the total price for the sale of the silent stations' licenses and related assets. Those data do not allocate a value specifically to the license. In the context of bankruptcy proceedings, however, efforts often are made to ascertain the value of a station's license for purposes of assessing the claims of secured creditors. *See, e.g., In re Oklahoma City Broadcasting Company d/b/a KGMC-TV Debtor*, 112 B.R. 425, 428 (Bankr. W.D. Okla. 1990). Defendants' own expert David Shutz provided testimony in the *KBMC-TV* case concerning the liquidation value of the debtor's FCC license, which he found to be somewhere between $750,000 and $1.2 million. *Id.* Thus, even when separated from the station's physical assets, the license of a television station unquestionably has considerable value.

Finally, regarding Question 2(a), it is worth adding that noncommercial educational television stations are not required to operate on a regular schedule and that no minimum hours of operation for such stations are specified. *See* 47 C.F.R. § 73.1740. The willful or repeated failure of such a station to maintain a minimum operating schedule will not occasion any FCC sanction.[7]

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[7] The FCC may, however, consider the station's operating schedule when assessing its application for license renewal. *Id.*

III. THIRD INQUIRY

Plaintiffs do not take issue with the federal defendants' response to Question 3.

[Signature Block Omitted]